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SUBJECT INDEX.

	Page
Official reports of opinions below	1
Statement of ground on which the jurisdiction of this Court is invoked	1
Statement of the case.....	2-16
This is a suit in equity	2
Act of Congress imperatively directed bringing of this suit for equitable remedies.....	2
Description of contracts and leases in suit.....	3
1. Contract of April 25, 1922.....	3
2. Lease of June 5, 1922.....	5
3. Contract of December 11, 1922.....	5
4. Lease of December 11, 1922.....	7
Grounds upon which cancellation and accounting sought	8
(1) Charge of fraud	8
(2) No legal authority for their execution...	8
(3) Prayer for accounting, injunction, receiver	9
Decree of the District Court.....	9
Opinion and decree of Circuit Court of Appeals	10
History of the naval reserves and laws and or- ders relating thereto	11
1. These lands open to settlement prior to 1909	11
2. Executive Order of September 27, 1909, temporarily withdrawing these lands from settlement	11
3. Validity of that order upheld (236 U. S. 459)	12
4. Act of June 25, 1910, Pickett Act, authoriz- ing withdrawal	12
5. Executive Order of July 3, 1910, confirming 1909 withdrawal	12
6. Executive Order of September 2, 1912, con- stituting Naval Reserve No. 1.....	12
7. Executive Order of December 13, 1912, con- stituting Naval Reserve No. 2.....	13
8. 1912 to 1920 Congress considers and debates oil and gas land legislation	13
9. The Leasing Act, approved February 25, 1920	13
The condition this law left the naval re- serves in	14
10. Naval Petroleum Reserve Act, approved June 4, 1920	14

	Page
11. Contracts and leases in suit made under act of June 4, 1920	15
12. Executive Order of May 31, 1921.....	15
I. Statement of Facts	16-95
1. Facts leading up to Executive Order of May 31, 1921	16
2. Text of that Order	18
3. Transactions prior to negotiations resulting in contract of April 25, 1922	20
4. Decision of Secretary of Navy to exchange royalty crude oil for fuel oil and storage facilities therefor at Pearl Harbor, Hawaii.	32
5. Steps taken by Government to obtain competition on Pearl Harbor projects.....	37
6. Bids on the Pearl Harbor project and action thereon	47
7. Execution of contract of April 25, 1922, between United States and Transport Company	58
8. The carrying on and completion of project provided for by the terms of contract of April 25, 1922	58
9. Execution of lease of June 5, 1922, and operations thereunder	59
10. Acts of the Navy Department which eventuated in negotiations resulting in execution of contract of December 11, 1922	60
11. Activities of officials of defendants between June 5 and November 29, 1922.....	64
12. Navy decision to contract for increased fuel oil and other petroleum products in storage at Pearl Harbor and to lease additional areas in Naval Reserve No. 1.....	72
13. Negotiations for the contract of December 11, 1922, and the lease bearing the same date	74
14. Execution of contract and lease of December 11, 1922	80
15. Operations under and completion of project provided for by contracts of April 25 and December 11, 1922	82
16. Operations, oil produced, and expenditures made, under leases of June 5 and December 11, 1922	86
17. Information transmitted to Congress, June 3, 1922, with message of President stating approval, June 7, 1922	86

	Page
18. The circumstances in which work under the contract of April 25 and December 11, 1922, were continued and completed	87
19. The evidence presented to defeat all of the contracts and leases in suit	88
II. Specifications of Error Intended to be Urged.	95
III. Argument	99
Point I. Under the Provisions of the Act of June 4, 1920, the Secretary of the Navy had Authority to Make the Exchange Contracts and the Leases Involved in This Case	100
Point II. The Appropriation Clause (of the Act of June 4, 1920) does not Limit the Power of the Secretary of the Navy under the Act, except in the Expenditure of Cash.	120
Point III. The Contracts of April 25 and December 11, 1922, Were Intended to Be and Were Exchange Contracts Within the Meaning of the Law. This is True Despite the Provisions Thereof by Which the Quantities of Crude Oil and of Fuel Oil to be Delivered Were Made Variable in Cases of Variance of the Reference Prices of These Two Commodities	125
Point IV. The Power to Lease Naval Reserve Lands, Conferred by the Act of June 4, 1920, Supports the Contracts as well as the Leases in Suit	141
Point V. The Contracts of April 25 and December 11, 1922, Are Not Void Because Providing for the Establishment of a New Naval Fuel Depot Without Express Authority from Congress	145
Point VI. The Contracts of April 25 and December 11, 1922, Were Not Invalidated by Reason of Any Lack of Public Advertisement	152
Point VII. The Secretary of the Navy Was Not Required to Resort to Competitive Bidding as a Condition Precedent to the Making of the Leases of June 5 and December 11, 1922	161
Point VIII. The Secretary of the Navy as Matter of Fact Exercised, in Connection with the Contracts and Leases Involved in This Suit, the Power Conferred Upon Him by the Act of June 4, 1920.....	162

	Page
Point IX. Secretary Fall did not Make, or Dominate the Making of, the Contracts and Leases in Suit	212
Point X. The Contracts of April 25 and December 11, 1922, Were Not Invalid Because of Any Illegal Delegation to the Secretary of the Interior of Discretionary Powers Which Could Only be Exercised by the Secretary of the Navy	244
Point XI. There is no Merit in the Contention That There Must Have Been a Conspiracy Because of the Observance of "Secrecy" in Connection with the Transactions Here Involved	263
Point XII. The Loan of \$100,000 by Mr. Doheny to Mr. Fall (1) in No Way Affected the Transactions in Issue; (2) Was a Bona Fide Loan and Not a Bribe; and (3) Was Not Proved by Any Evidence Competent and Admissible Against the Defendant Companies	273
Point XIII. Neither the Personal Loan Made by Mr. Doheny to Mr. Fall, Nor Any Other Fact Proven in This Case, Constitutes a Violation of Public Policy of Such a Nature as to Render Void or Voidable the Contracts or Leases Made and Executed by Secretary Denby	300
Point XIV. No Evidence of Conspiracy or Wrongdoing is Afforded by Correspondence Between Applicants for Leases and Various Government Officials, Nor Was it Legally Admissible	305
Point XV. This Suit Can Not Be Maintained Without Proof of Pecuniary Damage to the United States Resulting from the Contracts or Leases Attacked	307
Point XVI. The Transport Company, in Any View of the Case, is Entitled to be Credited with the Value of the Royalty Oil Heretofore Voluntarily Delivered to it by the United States, up to the Amount of the Beneficial Expenditures Made by it Upon the Property of the Government and Under the Terms of the Contracts	316

	Page
Point XVII. The Circuit Court of Appeals Also Erred in Refusing to the Petroleum Company the Credit Allowed by the Dis- trict Court	349
IV. Conclusion	351

TABLE OF CASES.

	Page
Albany Co. v. Stanley, 105 U. S. 305	260
Alexander v. Fidelity Trust Co., 249 Fed. 1	299
American Express Co. v. U. S., 212 U. S. 534	101
Anchor Oil Co. v. Gray, 257 Fed. 283	158
Argenti v. San Francisco, 17 Cal. 282	329
Armstrong v. Ashland, 204 U. S. 285	323
Atl. Contracting Co. v. U. S., 57 Ct. Cls. 185 ..	302, 303
Atlantic Delaine Co. v. James, 94 U. S. 207	256, 309
 Baldwin v. Franks, 120 U. S. 678	 260
Baltimore & Ohio R. R. Co. v. Western Union Tel. Co., 241 Fed. 162 (U. S. D. C.)	 110, 131
Baltimore & Ohio R. R. Co. v. Western Union Tel. Co., 242 Fed. 914 (C. C. A.)	 132, 136
Bangs Milling Co. v. Burns, 152 Mo. 356, 53 S. W. 923	 296
Bank of U. S. v. Dandridge, 12 Wheat. 64; 6 L. Ed. 552	 170
Berkeley Peerage Case, 4 Campb. 401	296
Biddeford v. Yates, 72 Atl. 335 (Me.)	248
Board of Trustees v. Spitzer, 255 Fed. 126 ..	253, 254-5
Boone County Nat. Bank v. Latimer, 67 Fed. 27..	299
Bostwick v. U. S., 94 U. S. 53	338
Bourgeois v. R. E. Co., 82 N. J. Eq. 215	323
Brent v. Bank of Wash., 10 Pet. 614	343
Brock v. Pearson, 87 Cal. 581	277
Brummitt v. Water Works, 33 Utah 285	260
Burke v. So. Pac. R. R. Co., 234 U. S. 669.....	254
Byrne v. Hafner Feed Co., 143 Mo. App. 85, 122 S. W. 350	 296
 Cass County v. Gibson, 107 Fed. 363	 247, 248
Canal Bank v. Hudson, 111 U. S. 66	323, 325
Causey v. U. S., 240 U. S. 399..	312, 318, 333, 334, 335-6
Central Imp. Co. v. Steel Co., 201 Fed. 824	325
Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 60	 330
Chapman v. Douglas County, 107 U. S. 348	329, 346
Chase v. U. S., 155 U. S. 489	121, 327
Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 242	 101
Chicago Great Western R. R. Co. v. Postal Tel.- Cable Co., 245 Fed. 592 (D. C.)	 132

	Page
Chicago Great Western R. R. Co. v. Postal Tel.- Cable Co., 249 Fed. 664 (C. C. A.).....	132
Chicago Great Western R. R. Co. v. Postal Tel.- Cable Co., 248 U. S. 471	133-4-5, 137
Child v. Bowers, 21 Atl. 539 (R. I.)	248
Church v. Church, 71 Fed. 252	344
Church of Holy Trinity v. U. S., 143 U. S. 457	111
Churchill v. Smith, 16 Vt. 560	296
Cincinnati & T. Ry. Co. v. Rankin, 241 U. S. 319..	169
Clarke v. The Mayor, 12 Wheat., 40	260
Clarke v. White, 12 Pet. 178	312
Cobb v. U. S., 7 Ct. of Claims, 470	158
Cobban v. Conklin, 208 Fed. 231	303
Columbia National Bank v. Rice, 48 Neb. 431, 67 N. W. 165	296
Conquerer, The, 166 U. S. 110	351
Cook v. U. S., 91 U. S. 389	337, 338
County of Mahaska v. Ingalls, 16 Iowa 81	296
County of Wilson v. The Bank, 103 U. S. 778..	115, 116
Cowen v. Adams, 80 Fed. 448	303
Crawford v. U. S., 212 U. S. 183	301
Crocker v. U. S., 240 U. S. 74	301
Crowder v. Sullivan (Ind.) 28 N. E. 94	153
Decorah v. Dunsto, 38 Iowa 96	248
Delassus v. U. S., 9 Pet. 117	169
Delk v. St. Louis & S. F. R. R. Co., 220 U. S. 580..	351
Del Pozo v. Wilson Cypress Co. 269 U. S. 82, 70 L. Ed. 73	164
Denver, etc, R. Co. v. U. S., 241 Fed. 614	350
De Walsh v. Braman, 43 N. E. (Ill.) 599	325-6
Dexter & Carpenter v. U. S., 275 Fed. 566	248
Diamond Coal & Coke Co. v. Payne, 271 Fed. 362..	328
Dold Packing Co. v. Doerman, 293 Fed. 315.320, 321-22	
Dooley v. The Railroad, 250 Fed. 143	116
Dranga v. Rowe, 127 Cal. 506	322
Eichlberger v. Mills Land Co., 9 Cal. App. 628 ..	309
Erie Coal & Coke Co. v. U. S., 266 U. S. 518.....	161
Estate of Baird, 193 Cal. 225	296
Estey v. Birnbaum, 9 S. D. 176	296
Ex Parte Yarborough, 110 U. S. 658	116

	Page
Farmers Ginnery Co. v. Thresher, 144 Ga. 598....	295
Farmers Loan & Trust Co. v. Denver, L. G. R. Co., 126 Fed. 51	325
Field v. Clark, 143 U. S. 649	260
Filbert v. Phila., 37 Atl., 575 (Pa.)	248
First Unitarian Society v. Faulkner, 91 U. S. 415..	295
Floyd Acceptances, 74 U. S. 666	327
Fowler v. U. S., 3 Ct. of Claims 43	121, 154
Gale v. Kalamazoo, 23 Mich. 343	260
Garman v. U. S., 34 Ct. Cls. 237	302
Garrow v. Davis, 15 How. 272	310
Gelpeke v. Dubuque, 1 Wall. 220.....	116, 253
Gilliat v. Lynch, 2 Leigh (Va.) 493	322
Goehring v. Stryker, 174 Fed. 897	295
Goetz v. Bank of Kansas City, 119 U. S. 551....	295
Gould v. Cayuga County Bank, 86 N. Y. 84	324
Gould v. Cayuga County Bank, 99 N. Y. 337	324
Great Northern Co. v. U. S., 155 Fed. 959	116
Great Northern R. R. Co. v. U. S., 108 U. S. 452..	161
Halvansen v. Moon & Kerr Lumber Co., 87 Minn. 18	296
Hammerschmidt v. U. S., 265 U. S. 182	308-9
Harrison County v. State Savings Bank, 127 Ia. 242	296
Heckman v. U. S., 224 U. S. 413, 308, 312, 318, 333, 335, 345	345
Hedges v. Frink, 163 Pac. 884	254
Hemmer v. U. S., 204 Fed. 906	158
Herman v. Oconto, 100 Wis. 391	302
Hitchcock v. Galveston, 96 U. S. 341 ..	247, 248, 259, 329
Hollerback v. U. S., 233 U. S. 165	337
Hooe v. U. S., 218 U. S. 322	327
Hubbard v. Todd, 171 U. S. 501	326
Hudson Milling Co. v. Higgins, 85 N. J. L. 268 ..	296
Hume v. U. S., 132 U. S. 406	302
Humes v. O'Brien, 74 Ala. 64	296
Hyde v. Shine, 199 U. S. 62	310, 311
Ill. Trust & Savings Bank v. Arkansas City, 76 Fed. 271	256-257
In re Claim of Iowa, 9 Dec. Comp. Treas., 656	156
In re Claim of Leach, 9 Dec. Comp. Treas., 457..	155
In re Johnson, 224 Fed. 185	254
In re Neagle, 135 U. S. 7	116

	Page
In re Snow & Ice Transportation Co., 22 Op. Attys. Gen. 437	155
In re Triangle S. S. Co., 3 Fed. (2nd) 896.....	248
Insurance Co. v. Bailey, 13 Wall. 616	309-10
Interstate C. C. v. Baird, 194 U. S. 36	101
Jackson v. Graves, 238 Fed. 117	158
Jenkins v. Mapes, 41 N. E. (Ohio) 137	110
Jenson v. Toltec Ranch Co., 174 Fed. 91	257
Judson v. U. S., 120 Fed. 643	344
Kalamazoo Novelty Mfg. Co. v. McAlester, 36 Mich. 326	295
Kenah v. The Tug John Markee, Jr., 3 Fed. 45..	296
Kepner v. U. S., 195 U. S., 125	158
Klamroth v. Albany, 127 N. Y. 575	247
Koshkonong v. Burton, 104 U. S. 678	315
Le Claire v. Davenport, 13 Iowa 210	248
Lessee of French v. Spencer, 21 How. 237	158
Levy v. Kress, 285 Fed. 838	320, 326, 347
Life Ins. Co. of Va. v. Hairston, 108 Va. 832, 128 A. S. R. 989	297
Lincoln Savings Bank v. Allen, 82 Fed. 148.....	254
Loan Ass'n. v. Topeka, 20 Wall. 655	116
Logan County Bank v. Townsend, 139 U. S. 67..	330
Loos v. Wilkinson, 113 N. Y. 485	322
Louisa County Nat. Bank v. Burr, 199 N. W. 359..	296
Lundean v. Hamilton, 184 Ia. 907	303
Luria v. U. S., 231 U. S. 9	116
Lutcher & Moore Co. v. Knight, 217 U. S. 257..2,	351
Lyons v. U. S., 30 Ct. Cl. 352	338
McCormick v. Shea, 99 N. Y. S. 467	277
McCulloch v. Maryland, 4 Wheat., 407	116
McCullough v. Smith, 243 Fed. 823	253, 257
McHenry v. Alford, 168 U. S. 672	116
McKnight v. U. S., 98 U. S. 179	343
McPhee & McGinnity Co. v. U. P. R. R. Co., 158 Fed. 5	257
Mack v. Jastro, 126 Cal., 130	254
Magone v. King, 51 Fed., 525	159
Mann v. Richardson, 66 Ill. 481	260
Mann v. U. S., 3 Ct. Cls. 404	337
Marsh v. Fulton County, 10 Wall. 684	319

	Page
Marsh v. Supervisers, 10 Wall. 676	330
Massey v. Allen, 13 Ch. Div. 558	297
Mathews Slate Co. v. N. E. Slate Co. 122 Fed. 972 ..	254
Matthews v. Alexandria, 68 Mo. 115	260
Mayor, etc. v. Wollman, 91 Atl. 339 (Ind.)	248
Meguire v. Corwine, 101 U. S. 108.....	304
Merry Realty Co. v. Real Estate Co., 230 N. Y. 316.	324
Milarky v. Cedar Falls, 19 Iowa 21	260
Ming v. Woolfolk, 116 U. S. 599	309
Mountain Copper Co. v. U. S., 142 Fed. 625 ...	344
Navigation Co. v. Windsor, 20 Wall. (U. S.) 70 ...	253
Neblet v. McFarland, 92 U. S. 101	319, 329
New Mexico v. Trust Co. 172 U. S. 171	116
New York Cent. & Hudson R. R. v. U. S., 21 Ct. Cl. 368	158
Niagara Falls Suspension Bridge Co. v. Bachman, 66 N. Y. 61	295
Northwestern Union Packet Co. v. Clough, 87 U. S. 528	295
Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413....	165
Oakland v. Carpentier, 13 Cal., 540.....	260
Oscanyan v. The Arms Co., 103 U. S. 261	304
Pacific Steam Whaling Co. v. U. S., 36 Ct. Cl. 105	156
Peek v. Detroit Novelty Works, 29 Mich. 313 ...	295
Pennsylvania R. R. Co. v. St. Louis R. R. Co., 118 U. S. 317	330
Phila. & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535	170
Pimintal v. San Francisco, 21 Cal. 363	329
Pine River Logging Co. v. U. S., 186 U. S. 279 ..	349
Poindexter v. Greenhow, 114 U. S. 270	260
Postal Tel. Cable Co. v. Tonopah R. R. Co., 248 U. S. 471	110, 129
Power Company v. Medford, 226 Fed. 926	258
Price v. City of Fargo (N. D.) 139 N. W. 1054 ..	153
Priddy v. Thompson, 204 Fed. 955	158
Providence Tool Co. v. Norris, 2 Wall. 45	304
Queen v. Hepburn, 7 Cranch 290, 3 L. Ed. 348 ...	298
Quinlan v. Green Co., 205 U. S. 410	170

	Page
Rand v. Dodge, 17 N. H. 343	296
Reagan v. Trust Co., 154 U. S. 395	253
Reuting v. Titusville, 34 Atl. 916 (Pa.)	247
Rogers v. U. S., 185 U. S. 87	158
Roger v. Shaw, 59 Cal. 260	277
Ross v. Stewart, 227 U. S. 530	169, 305
Rush v. Burns, 152 Mo. 660, 54 S. W. 1103	296
St. Charles Savings Bank v. Denker, 275 Mo. 607, 205 S. W. 208	296
Salley v. R. R. Co., 62 S. C. 128	296
San Francisco Gas Light Co. v. Dunn, 62 Cal 580	258-9
Scott v. Scott, 18 Gratt. (Va.) 150.....	322
Second Russian Ins. Co. v. Miller, 268 U. S. 552, 69 L. Ed. 1088	165
Seltzer v. Metropolitan Elec. Co., 199 Pa. 100	302
Shafer v. Spruks, 225 Fed. 482	320
Shea v. Milford, 14 N. E. 764 (Mass.)	247
Shearer v. Farmers' Life Insurance Co., 262 Fed. 868	320, 323, 326, 329, 348
Shipman v. U. S., 18 Ct. Claims 138	121
Sigafus v. Porter, 179 U. S. 116	308
Silzer & Co. v. Melton & Sons, 129 Ga. 143; 113 S. E. 559	296
Siren, The, 7 Wall. 152	341
Smith v. Bolls, 132 U. S. 125	308
Smith v. Hansen, Admx., 34 Utah 171; 18 L. R. A. (N. S.) 520; 96 Pac. 1087	296
Smith v. Moore, 142 N. C. 277; 7 L. R. A. (N. S.) 684	296
Smith v. U. S., 69 U. S. 219, 17 L. Ed. 788	277
Soper v. Buffalo & Rochester R. R. Co., 19 Barb. (N. Y.) 310	295
Spiegler v. Chicago, 74 N. E. 719 (Ill.)	248
State v. Milwaukee, 121 N. W. 658 (Wis.)	248
State v. Stoll, 17 Wall. 425	157
Steel Co. v. U. S., 235 U. S. 460	116
Stoffela v. Nugent, 217 U. S. 499.....	320, 321
Stratton's Independence v. Dines, 135 Fed. 458 ..	309
Sussex Peerage Case, Clark & Finnelly's Reports, Vol. 2. p. 85	296
Sutton v. U. S., 256 U. S. 575	327

	Page
Tate v. Tate's Executors, 75 Va. 522	297
Teapot Dome Lease Case, 5 Fed. (2d) 330. 111, 161, 174, 208-9, 246, 283, 291, 299, 316	316
Telegraph Co. v. Eyser, 19 Wall., 427	115
Thomas v. West Jersey R. R. Co., 101 U. S. 71....	330
Topliff v. Topliff, 122 U. S. 121	253
Townsend v. Little, 109 U. S. 504	158
Trist v. Child, 21 Wall. 441	304
Twin Lakes Co. v. Dohner, 242 Fed. 402	320
Union Central Life Ins. Co. v. Drake, 214 Fed. 548.	325
Union Naval Stores v. U. S., 240 U. S. 284	349
U. S. v. Arredondo, 6 Pet. 691; 8 L. Ed. 547 ..	343
U. S. v. Babbitt, 1 Black 61	116
U. S. v. Belridge Oil Co., (D. C. S. D. Cal.) Unre- ported	161, 162
U. S. v. Belridge Oil Co. (C. C. A. 9th Cir.).....	224
U. S. v. Bentley, 293 Fed. 235	338, 346
U. S. v. Bradley, 10 Peters 343	253
U. S. v. Budd, 43 Fed. 464	344
U. S. v. Carter, 217 U. S. 286	303
U. S. v. Chase, 135 U. S. 255	158
U. S. v. Commercial Co., 74 Fed. 145	344, 346
U. S. v. Commissioners, 254 Fed. 543	344
U. S. v. Conklin, 177 Fed. 55	311
U. S. v. Debell, 227 Fed. 779	326, 330, 344
U. S. v. Detroit Lumber Co., 200 U. S. 321	334, 346
U. S. v. Diamond Coal Co., 254 Fed. 286	344
U. S. v. Dominion Oil Co., 241 Fed. 425	344
U. S. v. Donnelly, 228 U. S. 242, 57 L. Ed. 820....	297-8
U. S. v. Ellicott, 223 U. S. 524	160
U. S. v. Engine Co., 91 U. S. 321	116
U. S. v. Envelope Co., 249 U. S. 313	160
U. S. v. Fuller Co., 296 Fed. 180	337
U. S. v. Hodson, 10 Wall. 408	253
U. S. v. Linn, 1 How. 104; 11 L. Ed. 64	277
U. S. v. McDaniel, 7 Pet. 1	116
U. S. v. Mammoth Oil Co., 5 Fed. (2d) 330. 111, 152, 161, 174, 208-9, 246, 283, 291, 299, 316	316
U. S. v. Mathews, 173 U. S. 381	156
U. S. v. Midwest Oil Co., 236 U. S. 459	12
U. S. v. Noce, 268 U. S. 613.....	161
U. S. v. No. Am. Comm. Co., 74 Fed. Rep. 151 ..	337
U. S. v. Okl. Gas. Co., 297 Fed. 575	344

	Page
U. S. v. Poland, 251 U. S. 221	336
U. S. v. Products Co., 300 Fed. 451	338, 346
U. S. v. Royer, 45 Sup. Ct. Rep. 519	318, 320, 328
U. S. v. San Jacinto Tin Co., 125 U. S. 273	311
U. S. v. Speed, 8 Wall. 77	211
U. S. v. State Investment Co., 264 U. S. 206, 68 L. Ed. 639	165
U. S. v. Stinson, 197 U. S. 205	343
U. S. v. Thekla, 266 U. S. 328 ... 340, 341, 342, 345	
U. S. v. Trinidad Coal Co., 137 U. S. 161, 312, 318, 333, 334, 335	344
U. S. v. White, 17 Fed. 565	344
U. S. Bank v. Dandridge, 12 Wheat. 64; 6 L. Ed. 552	170
U. S. <i>ex rel.</i> Ness v. Fisher, 223 U. S. 683, 56 L. Ed. 610	108, 144
Utah Nat. Bank v. Nelson, 111 Pac. 906.....	299
Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S. 99	295
Vohs v. Shorthill, 124 Iowa 476	296
Walker Mfg. Co. v. Knox, 136 Fed. 334.....	296
Walker v. U. S., 139 Fed. 413	344
Walla Walla v. The Walla Walla Water Co., 172 U. S. 1	157-8
Wallace v. Tice, 51 Pac. (Ore.) 733	277
Washington Irrigation Co. v. Krutz, 199 Fed. 279 302-3	
Washington Securities Co. v. U. S., 234 U. S. 76..	336
Western Maid, The, 257 U. S. 419.....	340-1
Whitcomb v. Shultz, 223 Fed. 268.....	324
Whiteside v. U. S., 93 U. S. 247	327
Winchester & Partridge Mfg. Co. v. Creary, 116 U. S. 161	295
Woldenberg v. Sampson, 104 Pac. 184 (Wash.)..	248
Woodenware Co. v. U. S., 106 U. S. 432.....	349
Woolsey <i>et al.</i> v. Haynes, 165 Fed. 391.....	296
Xenia Bank v. Stewart, 114 U. S. 224.....	295, 297

TEXT-BOOKS AND OTHER REFERENCES.

	Page
Benjamin on Sales, 7th Ed., p. 2.....	110
Chitty on Contracts, Vol. II, p. 392.....	324
Cook on Corporations, Vol. 4, Sec. 726.....	295, 296
21 Corpus Juris, 175.....	322
22 Corpus Juris, 130-133	169
23 Corpus Juris, 186-7.....	110
39 Cyc. 1378	330
Fletcher, Cyclopaedia Corporations, Vol. 3, Sec. 2163	296
Green's Brice's Ultra Vires, p. 503	295
Jones on Evidence, 3rd Ed., Sec. 255, pp. 383, 384.	295
Jones on Evidence, 3rd Ed., Sec. 323.....	297
Jones on Evidence (Civil Cases), 3rd Ed., Sec. 13, p. 18	299
Jones on Evidence, Howitz' Blue Book Edition, Sec. 344, p. 810	295
Negotiable Instruments Act, Sec. 123.....	277
Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 386	325
Pomeroy's Equity Jurisprudence, 2nd Ed., p. 2480	325
Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 910, p. 1627	319
Shealey on Law of Government Contracts, p. 159	162
Story's Equity Jurisprudence, 14th Ed., Sec. 957	320
Williston on Contracts, Sec. 1529.....	324
Words & Phrases, 1st Series, p. 2546.....	110

STATUTES CITED.

Sec. 1552 R. S. U. S. (Act Aug. 31, 1842).....	145
Sec. 3617 R. S. U. S.	138, 139
Sec. 3618 R. S. U. S.	138, 139
Sec. 3709 R. S. U. S.	152
Sec. 3728 R. S. U. S. (Act of Sept. 28, 1850, 80 Stat. L. 513)	153
Sec. 3744 R. S. U. S.	156

IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

No. 305.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY and
PAN AMERICAN PETROLEUM COMPANY,
PETITIONERS (Defendants below),

v.

THE UNITED STATES OF AMERICA,
RESPONDENT (Plaintiff below).

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Official Reports of the Opinions Below:

The opinion of the District Court (*R. v. III*, 1250-1393) is reported in 6 Fed. (2d) 43.

The opinion of the Circuit Court of Appeals (*R. v. III*, 1478-1514) is reported in 9 Fed. (2d) 761.

**Statement of the Grounds on which the Jurisdiction
of this Court is invoked:**

(1) The decrees to be reviewed are those of the District Court, dated July 11, 1925 (*R. v. III*, 1528-36), and of the Circuit Court of Appeals, dated January 4, 1926 (*R. v. III*, 1515).

The petition for writ of certiorari was filed February 24, 1926, and the writ was granted March 22, 1926 (*R. v. III*, 1522).

(2) The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of

February 13, 1925 (43 Stat. 936; Fed. Stat. An. 1925 Supp. p. 84).

See *Lutcher & Moore Co. v. Knight*, 217 U. S. 257.

Statement of the Case.

This case is here on certiorari, allowed March 22, 1926, to the United States Circuit Court of Appeals for the Ninth Circuit to review decree of that Court in part affirming and in part reversing a decree entered by the District Court, Southern District of California, in a suit in equity wherein the United States was plaintiff and the Pan American Petroleum & Transport Company and Pan American Petroleum Company were defendants. Herein we shall refer to the first of these defendants as the Transport Company and the second as the Petroleum Company; also we shall refer to the parties as plaintiff and defendants.

On March 17, 1924, the United States, being the proprietor of a large tract of oil land in California, known as Naval Petroleum Reserve No. 1, instituted this suit in equity against the two defendant companies in the District Court for the Southern District of California. The plaintiff prayed the cancellation of two contracts and two leases, temporary and permanent injunctions, receivership, and accounting (R. v. I, 23-24).

The bringing of this suit was directed, and its character explicitly specified, by the provisions of a special act of Congress (43 Stat. 5; "Joint Resolution directing the President to institute and prosecute suits to cancel certain leases of oil lands and incidental contracts, and for other purposes," approved February 8, 1924), by which, with express reference to the contracts and leases here involved, "the President" was "authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of said leases and contract and all contracts incidental or supplemental thereto, to enjoin the further extraction of oil from the said reserves under

said leases or from the territory covered by the same," and "to secure any further appropriate incidental relief."

Despite the rather confusing references which will be found in the record to a number of contracts and leases, the only ones in suit, and hence the only ones with which we are here concerned, are four in number, entered into under authority of Act of Congress approved June 4, 1920 (41 Stat. 812; plaintiff's bill, R. v. I, 10-11). These contracts dated April 25th and December 11, 1922, and leases dated June 5 and December 11, 1922, are briefly described as follows:

1. Contract between the United States and the Transport Company dated April 25, 1922 (R. v. I, 27-40), whereby the latter agreed to furnish and deliver, "at the United States naval station at Pearl Harbor, Territory of Hawaii" (ib. 28), 1,500,000 barrels of fuel oil, according to United States navy specifications, and to deliver said fuel oil into storage facilities constructed and erected by the contractor at the United States naval station at Pearl Harbor according to Navy Department specifications attached to and made part of the contract. This contract recites that "It is the intention of the parties hereto to effect an exchange of crude oil which is unsuitable for fuel for the United States Navy, and which is produced from naval petroleum reserves Nos. 1 and 2, in the State of California, said crude oil being the property of the Government, for fuel oil suitable for the use of the United States Navy," to be delivered as aforesaid (R. v. I, 28).

In consideration of the undertaking above described the Government agreed—

First: To deliver to the Transport Company that number of barrels of crude oil from the California naval reserves, which, in accordance with the terms of the contract, would represent the equivalent of the number of barrels of fuel oil furnished, plus the equivalent of the cost of construction of the storage facilities therefor; but in no event, regardless of that cost,

was the Transport Company to receive more than a fixed amount (R. v. I, 35). In other words, a maximum cost was specified beyond which the Government was not obligated but in the event the actual cost was below that maximum the benefit thereof was to be the Government's.

Second: To give the Transport Company a preferential right to any "future leases" which "during the life of this contract shall be granted by the Government within" a described "portion of California naval petroleum reserve No. 1," provided, in the event the Government determined to grant any such future leases, the contractor agreed to meet such drilling conditions and to pay such royalties as the Secretary of the Interior prescribed. It was further provided that "In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in said bidding" (R. v. I, 34-35). This "preferential right" was to exist "during the life" of the contract (R. v. I, 34), which was fixed at 500 days (Ib. 36).

This contract of April 25, 1922, was signed:

"The United States of America, By Edward C. Finney, Acting Secretary of the Interior. By Edwin Denby, Secretary of the Navy.

For and on behalf of the United States of America" (R. v. I, 36).

Under that contract everything required of the Transport Company had been entirely completed and had been finally accepted as a complete project by the Navy Department by December 15, 1923, three months before this suit was filed (R. v. II, 575, on which page "1922" is typographical error and should be read "1923"; R. v. III, 1201), and all of the crude oil which the Transport Company was entitled to receive from the Government under the terms of this contract in ex-

change for fuel oil and storage facilities therefor has been received by the Transport Company (R. v. III, 1198).

2. "Lease of Oil and Gas Lands Under the Act of June 4, 1920," dated June 5, 1922, between the United States and the Petroleum Company, of a quarter section of land in Naval Reserve No. 1.

This lease, signed on behalf of the United States by the First Assistant Secretary of the Interior, was made pursuant to agreement contained in letter to J. J. Cotter, Vice-President of the Transport Company, dated April 25, 1922, signed by the Secretary of the Navy and the Acting Secretary of the Interior, definitely agreeing to lease within one year two small tracts of land in Naval Reserve No. 1 "in order that the Government may take advantage of a contract embodying terms outlined in Proposal B" of the Transport Company, which, it was stated, was considered most advantageous to the Government. This letter is Exhibit E to plaintiff's bill (R. v. I, 65-68), and the lease dated June 5, 1922, of one of the pieces of land referred to in said letter is Exhibit F to plaintiff's bill (R. v. I, 68-83). This lease, originally made to the Transport Company, was shortly after its date "with the consent of the United States" assigned to the Petroleum Company (R. v. I, 432).

3. Contract between the United States and the Transport Company dated December 11, 1922, the purpose of which, as stated in it, was to provide, "in accordance with the plans of the General Board of the Navy," for the prompt filling with fuel oil of the tanks provided for in the April 25, 1922, contract, as they were individually completed, "and also to procure for the Navy additional amounts of fuel oil and other petroleum products in storage at Pearl Harbor, T. H., and elsewhere," as set forth in a letter of the Secretary of the Navy dated November 29, 1922, to the Secretary of the Interior, requesting the latter "to arrange for such additional fuel oil and other petroleum products

in storage through exchange therefor of additional royalty crude oil belonging to the Government in said California naval reserves'' (R. v. I, 41-42). By this contract the Transport Company obligated itself to do the following things:

(1) Construct additional storage facilities at the Naval Station at Pearl Harbor and fill with 2,700,000 barrels of fuel oil and other petroleum products, including Diesel oil, lubricating oil, aviation and other gasoline. This was to be done at actual cost.

(2) Keep in storage at all times, during fifteen years, at the Transport Company's own cost and expense and in its own storage facilities, at designated points on the Atlantic, a minimum of 3,000,000 barrels of its own fuel oil, which shall be subject to the demand of the Navy at any time upon notice as specified in the contract.

(3) Furnish without charge, for a period of fifteen years, storage for 1,000,000 barrels of fuel oil at Los Angeles, California, and place same in the custody of the Government.

(4) Fill the last mentioned storage, after it had been compensated for the Pearl Harbor project, with 1,000,000 barrels of fuel oil for the Navy, and keep that quantity always in storage for fifteen years.

(5) Bunker Navy ships at Los Angeles Harbor for a period of fifteen years at cost.

(6) Construct a pipeline from Naval Reserve No. 1 in Kern County to tidewater, and convey, free of charge, the Navy's oil through that pipeline.

(7) For fifteen years to sell to the Navy its requirements on the Pacific Coast of petroleum products at 10 per cent below current market prices.

(8) Furnish petroleum products and storage facilities at points to be designated by the Government at any time after the contracting company had been reimbursed in crude oil for fuel oil, other specified petroleum products, and facilities at Pearl Harbor.

In consideration of the above described undertakings the Government agreed—

(1) To deliver to the Transport Company as and when produced from Naval Reserves Nos. 1 and 2, California, crude oil at the posted field price thereof in amount equal to the cost of the construction of the storage facilities, without profit, and the market price of the oil delivered into those facilities, plus transportation at going rates.

(2) To lease to the Petroleum Company the then unleased portion of Naval Reserve No. 1, with a restriction against the drilling by the lessee of the western half of that reserve until the Government consented.

In addition to the above considerations moving to the Government there was a further consideration of royalties in crude oil to be rendered to the Government according to a schedule set forth in the lease.

The contract of December 11, 1922, was signed on behalf of the United States by Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy. It is Exhibit C to the bill of complaint (R. v. I, 41-50). All of the construction work under that contract has been entirely completed and accepted by the Navy Department (R. v. III, 1197; 1201). At the time decree in this suit was entered in the District Court the Transport Company had received from the Government the greater part of the crude oil which it was entitled to receive under the terms of this contract (R. v. III, 1198-9).

4. "Lease of oil and gas lands under the act of June 4, 1920," dated December 11, 1922, between the United States and the Petroleum Company. This is for a term of twenty years and so long thereafter as oil or gas is produced in paying quantities from the lands described in the lease, which lands include all of the theretofore unleased lands belonging to the Government in Naval Petroleum Reserve No. 1, subject, however, to the provision that no drilling shall be done by the lessee without the consent of the lessor in an area comprising lands in twenty-seven sections and con-

stituting, practically, the Western half of Naval Reserve No. 1 (see Exhibit XXX, R. v. III, 1209-10; v. I, 57; v. II, 791). Substantially, this lease is in the usual form of Government oil and gas land leases, and after providing for the obligation of the lessee in respect of well drilling it is stipulated that the lessee will yield the lessor royalty of $12\frac{1}{2}$ to 35 per cent of all oil produced of 30 degrees Baumé or over, and from $12\frac{1}{2}$ to 30 per cent of all oil produced of less than 30 degrees Baumé. The lessor reserves the right to take the royalties in kind or accept payment therefor.

The lease is signed for the United States of America by Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, and will be found in full as Exhibit D to plaintiff's bill (R. v. I, 50-65).

GROUNDS UPON WHICH CANCELLATION AND ACCOUNTING
SOUGHT.

The Government invoked the jurisdiction of a court of equity to cancel these contracts and leases on two grounds:

(1) That they were fraudulently made by Albert B. Fall, Secretary of the Interior, purporting to act on behalf of the United States, as a result of conspiracy between himself and E. L. Doheny, the chief executive officer of defendant companies, and that they were executed and caused to be executed by Secretary Fall in consideration of a bribe promised to and received by him under the express agreement that upon that consideration he would make these contracts and leases.

(2) That, in any event, there was no lawful authority to be found in any act of Congress for the execution by any officer of the Government of contracts and leases of the character here in suit.

In addition to cancellation plaintiff prayed that the Transport Company be required to account for the value of all royalty crude oil and gas delivered to it in exchange, as aforesaid, by the United States, and that the Petroleum Company be required to account to

plaintiff for the value of all oil and gas obtained by it from the leased lands. The bill also prayed for injunction and receiver.

THE DECREE OF THE DISTRICT COURT.

Upon the filing of the bill receivers were appointed to take possession of, hold and operate, *pendente lite*, the leased lands, and an order was entered enjoining defendants *pendente lite* from operating the same (R. v. I, 6).

After trial the District Court filed a memorandum opinion (R. v. III, 1250-1393); findings of fact, 94 in number (ib. 1393-1421; 1427-8), and conclusions of law (ib. 1422-1427), and on July 11, 1925, entered decree (a) granting plaintiff's prayers for cancellation of the aforesaid contracts and leases, (b) stating an account between the plaintiff and the Transport Company by which the latter was allowed credit for the value, at cost, of the fuel oil and storage facilities furnished by it at Pearl Harbor, and charged for the crude oil it had received from the Government; (c) stating an account between the Petroleum Company and plaintiff by which the former was allowed credit for its expenditures in drilling, putting on production, and maintaining and operating wells drilled under the leases of June 5 and December 11, 1922, and was charged with the value of all oil and gas taken from the lands covered by said leases (R. v. III, 1428-36).

The action of the District Court in granting cancellation of the contracts and leases was based on the following grounds:

First, that the contracts and leases were fraudulently made by Secretary of the Interior Fall pursuant to a conspiracy between him and E. L. Doheny (R. v. III, 1366; 1390);

Second, that while there was ample power under the Act of June 4, 1920, for the Secretary of the Navy to have made the contracts and leases, he did not make them, but they were in fact made by the Secretary of

the Interior, who had no authority under the law to make them (R. v. III, 1367) ;

Third, that the contracts contained unlawful delegations of authority to the Secretary of the Interior which rendered them void (ib. 1390-1) ;

The District Court discussed the law of June 4, 1920, very fully in its opinion (R. v. III, 1366-1386) and held that this law gave the Secretary of the Navy power to make the exchange contracts in question, and that in the absence of fraud and of the delegation of authority just referred to "the contracts and leases in suit would be authorized and would be binding obligations upon the United States of America under the Act of June 4, 1920" (R. v. III, 1390-1).

The action of the District Court in allowing credits to the two defendants in the account stated as aforesaid was based on the rule that "He who seeks equity, must do equity," and on the fact that the expenditures at Pearl Harbor by the Transport Company and upon the leased lands by the Petroleum Company were found by the Court to have been made in compliance with and in performance of the terms of the contracts of April 25 and December 11 and of the leases of June 5 and December 11, 1922, and to have been of value and benefit to the United States equal to their cost (R. v. III, 1391-2; 1421; 1427-8).

From the decree of the District Court defendants prosecuted an appeal to the Circuit Court of Appeals, Ninth Circuit, assigning 51 grounds of error (R. v. III, 1437-52) ; and plaintiff prosecuted cross-appeal assigning as error the allowance to defendants of credit for cost of storage facilities and fuel oil contents thereof at Pearl Harbor and for the actual expenditures in connection with the drilling and operation of wells on the leased land (R. v. III, 1458-63).

OPINION AND DECREE OF THE CIRCUIT COURT OF APPEALS

In its opinion the Circuit Court of Appeals—

(a) Did not discuss the facts involved in the ques-

tion of fraud, conspiracy or public policy, saying that "while the evidence may be insufficient to support certain contested findings the disputed facts, in view of our conclusions upon the law applicable to the case, become of little importance" (R. v. III, 1499);

(b) Disagreed with the District Court's view as to the scope and interpretation of the law of June 4, 1920, and held that the Secretary of the Navy had no power to make contracts and leases such as those attacked (ib. 1501-5);

(c) Held that the District Court erred in allowing the companies the respective credits hereinbefore alluded to (ib. 1508-13).

By its decree, entered January 4, 1926, the Circuit Court of Appeals—

(a) Affirmed the decree of the District Court so far as it awards affirmative relief to the United States in ordering the cancellation of the leases and contracts;

(b) Reversed that portion of the District Court's decree which directs that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditure of money in drilling and putting on production wells drilled on the leased lands (R. v. III, 1515).

HISTORY OF THE NAVAL RESERVES AND LAWS AND ORDERS RELATING THERETO

Preliminary to a statement of the facts, we here present the legal status of the naval petroleum reserves.

Prior to 1909 all public lands containing petroleum or other mineral oils had been declared by Congress to be "free and open to occupation, exploration and purchase by citizens of the United States . . . under regulations prescribed by law." 29 Stat. 526 (see 236 U. S., 466).

On September 27, 1909, the President of the United States issued an order providing that in aid of proposed legislation affecting the use and disposition of

the petroleum deposits on the public domain, all public lands in accompanying lists were temporarily withdrawn from location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public-land laws. (236 U. S., at page 467.)

This was one of a series of withdrawal orders promulgated in 1909 and 1910. A list attached to the foregoing order described an area aggregating 3,041,000 acres in California and Wyoming—though, of course, the order only applied to the public lands therein, the acreage of which was not shown. The lands involved in this suit were included in that acreage.

There was doubt, entertained by the President and expressed by him in a message to Congress, as regards the validity of these orders. In *United States v. Midwest Oil Co.*, 236 U. S. 459, that doubt was resolved in favor of validity.

The act approved June 25, 1910 (c. 421, 36 Stat. 847), frequently referred to as the Pickett Act, authorized the President, at any time in his discretion, to temporarily withdraw from settlement, location or entry any of the public lands of the United States and reserve the same for any public purposes "to be specified in the orders of withdrawal, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress." The act provided for the protection of the rights of bona fide occupants or claimants of oil or gas bearing lands and also provided that all such withdrawals should be reported to Congress.

Following this, on July 2, 1910, by executive order the President confirmed and ratified the outstanding withdrawals and withdrew lands subject to the conditions and limitations of the Act. Thereafter, on September 2, 1912, the President, under the authority of the Act of June 25, 1910, issued an order providing that certain of the lands withdrawn on July 2, 1910, from settlement, location, sale or entry "shall hereafter, subject to valid existing rights, constitute Naval Petro-

leum Reserve No. 1, and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by act of Congress." These lands included all involved in this suit. The Secretary of the Interior, compliant to the requirement of the act of June 25, 1910, reported the foregoing withdrawal to Congress at the next session after September 2, 1912. Hence it will be seen that the Pickett Act was strictly complied with in that the public purpose of the withdrawal was "specified" in the order of the withdrawal, namely, "for the exclusive use or benefit of the United States Navy," and the withdrawal and the purpose thereof were duly reported to the Congress.

Later in the same year, December 13, 1912, the President promulgated a precisely similar order of withdrawal constituting Naval Reserve No. 2 in California "for the exclusive use or benefit of the United States Navy," and this was reported to Congress.

From 1912, when the aforementioned executive orders were issued, until 1920, there was constantly before the Congress and its appropriate committees proposed legislation relating to the withdrawn oil and gas bearing lands. The entire subject received the greatest consideration and was during a period of nearly eight years exhaustively debated. There resulted, first, the Act approved February 25, 1920, known as "The Leasing Act," and, second, the Act of June 4, 1920, governing the naval petroleum reserves.

In argument hereinafter we shall discuss the Act of February 25, 1920. Suffice it here to note that it committed the administration of oil and gas bearing public lands to the Secretary of the Interior; provided for permits to prospect for oil and gas upon specified areas of public lands, and for the leasing thereof, and also for the leasing within the naval reserves of producing wells to claimants under the prior placer mining law; authorized restricted area leases by the President of naval reserve lands comprised in any such claim; and authorized the Secretary of the Interior to

retain for use or sell royalty oils accruing to the United States from leases made under the Leasing Act.

Neither the Secretary of the Navy, nor any bureau in or officer of the Navy Department, had any authority or power under the Act of February 25, 1920.

The authority given the Secretary of the Interior "in his judgment" to "retain for use" oils reserved as royalty was of no practical importance since he had at his disposal no storage in which the oil could be retained and since the crude oil could not be used except in the course of some exchange, for which there was no authority of law.

Oil produced from the naval petroleum reserve lands could only be sold.

When sold, the proceeds of the sale went into the miscellaneous funds of the Treasury.

Neither the oil nor the proceeds of the sale of the oil was available to the Navy.

Obviously if there were to be petroleum reserves "for the exclusive use or benefit of the Navy," further legislation was essential.

The Secretary of the Navy submitted to the Chairmen of the Senate and the House Naval Affairs Committees a draft of a proposed law having for its purpose the turning over to the Navy Department possession of the naval petroleum reserves with full authority over the same and over the products thereof (House Doc. 101, 68th Cong. 1st Sess. 603 et seq.). The legislation thus recommended was,—with two changes in the draft, the first of which omitted authority to "refine" and the second providing protection for claimants under the Leasing Act or other existing laws,—attached as a rider to the then pending naval appropriation act, enacted into law, and is referred to in this case as the Act of June 4, 1920. By this Act it is provided:

"That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject

to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled 'An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain,' or pending applications for United States patent under any laws; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States; And provided further, That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby; And provided further, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922; Provided further, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct."

All of the contracts and leases involved in this case were made under the authority of this last quoted legislation.

The Act of June 4, 1920, conferred upon the Secretary of the Navy broad and comprehensive powers in respect of naval petroleum reserve lands on which there were no accrued rights or pending claims or applications for permits or leases under the provisions of the Act of February 25, or any other law. Resort by the Navy to the Interior Department for assistance was therefore imperative.

On May 31, 1921, the President of the United States, in circumstances hereinafter stated, promulgated an

executive order relating to the administration of the naval petroleum reserves, which order is set forth in full as Exhibit A to plaintiff's bill (R. v. I, 25-6).

Statement of Facts.

Albert B. Fall became Secretary of the Interior and Edwin Denby became Secretary of the Navy on March 5, 1921.

In the previous administration "antagonisms" had existed between officials of the two departments "with respect to these matters" (R. v. I, 311).

Beginning October 30, 1919, the Standard Oil Company of California had drilled 18 wells across the southern end of Section 36, owned by it, immediately adjoining the north line of Section 1 of Naval Reserve No. 1 (R. v. III, 1148). The location of these wells with reference to the aforesaid Section 1, and wells subsequently drilled in the latter section, is shown on Exhibit E-5, page 1214, volume III of the record, and the relation of said sections, and the wells drilled therein, to the entire reserve, is shown on Exhibit XXX, page 1210. The Standard Oil wells had had a large daily initial production and large quantities of oil had been produced therefrom (R. v. III, 1148-9).

In April, 1921, the Secretary of the Navy by circular addressed to a number of companies and individuals in the oil business invited proposals for a lease of a strip of land in Section 1 of Naval Petroleum Reserve No. 1 on which lessee was to be required to drill 22 wells. In response to this invitation a number of proposals were received by the Navy Department (R. v. I, 460-9). The Navy Department was anxious to promptly lease this land and to get under way the drilling of 22 wells thereon (R. v. I, 313-15). But there was at the time an unsettled placer mining claim of the United Midway Oil Land Company to this land, with an appeal for a lease or leases in settlement of that claim, under the provisions of the Act of February 25, 1920, pending before the President of the

United States. On April 20, 1921, five days before the opening by the Navy Department of bids invited as aforesaid, the President referred to the Secretary of the Interior for report this United Midway Company claim (R. v. I, 454). Previously the claimant's attorney had called the claim to the attention of Secretary Fall, and Assistant Secretary Finney had reported thereon (R. v. I, 451-4). Differences arose between officials of the Navy and the Secretary of the Interior on the subject of the United Midway claim (R. v. I, 472-3). The conflicts and antagonisms between the two departments quite apparently still existed (R. v. I, 471).

While the matters just referred to were pending, the Secretary of the Navy suggested to the President that the Secretary of the Interior should be placed in charge of administration of the laws relating to the naval reserves (R. v. I, 311; Sen. Doc. No. 191, 67th Cong. 2d Sess., p. 3). First Assistant Secretary Finney of the Interior Department rendered an opinion to the effect that under existing laws the Secretary of the Navy could request the Secretary of the Interior to handle for the Navy the conservation, development and operation of the lands in the naval reserves and that this would avoid "the duplication, antagonisms and divisions of authority which existed under the past administration with respect to these matters" (R. v. I, 309-11). Mr. Finney prepared a draft of an executive order to accomplish this purpose and a letter transmitting it to the Secretary of the Navy (R. v. I, 311-12; 459-60).

The proposed executive order as drafted in the Interior Department was the subject of discussion and consideration among naval officers and the Assistant Secretary, and between the latter and the Secretary of the Navy; was amended in the Navy Department and in amended form approved by Secretary Denby; in that form was personally presented by Assistant Secretary Roosevelt to Secretary Fall, who approved

the same, and was taken by the Assistant Secretary of the Navy to the President and by the latter promulgated May 31, 1921 (R. v. II, 943-949). It reads as follows (R. v. I, 25-26):

“Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder of any part of a claim upon which such wells have been drilled, and under authority of the Act of Congress approved June 4, 1920 (41 Stat. 812), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration, and conservation, of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President, but no general policy as to drilling or reserving lands located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves subject to the conditions and limitations contained in this order and the existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

The White House, May 31, 1921.”

Following promptly upon the promulgation of this order the Acting Secretary of the Navy, Admiral McVay, transmitted to the Interior Department bids which had been received for lease of land in Section 1, Naval Petroleum Reserve No. 1, on which 22 wells were to be drilled, with request for action thereon, consulta-

tion to be had with the Secretary of the Navy before final action on these bids, as provided by the executive order (R. v. I, 313-15). Assistant Secretary of the Interior Finney in the presence of officers of the Navy and others opened the bids and turned them over to Dr. Mendenhall of the Geological Survey for analysis, advising Secretary Fall of this action (ib. 315; 460-470). Officials of the Navy Department desired that lease be entered into with the Pan-American Petroleum Company. The situation was complicated by the United Midway claim to the land. Secretary of the Interior Fall requested E. L. Doheny, the then President of the Petroleum Company, the highest bidder, to accept lease on a strip sufficient for the drilling of 14 wells to the end that by granting a lease on the remainder of the strip to United Midway Oil Land Company, the pending claim of that Company might be settled. Petroleum Company agreed. A lease on precisely the same terms for a strip on which eight wells were to be drilled was made with the United Midway Company, and the claim of that Company thereby settled. This entire transaction was fully reported under date of July 8, 1921, to the President of the United States (R. v. I, 470-6), and was approved by President Harding (R. v. I, 476).

On the same date, July 8, 1921, Secretary Fall wrote Mr. Doheny and expressed appreciation of the latter's action in surrendering a portion of the lease in Section 1; quoted from his (Secretary Fall's) letter to the President on the subject, and stated that there would be no possibility of further conflict between Navy officials and the Interior Department as Secretary Fall had notified Secretary Denby that the former should conduct the matter of naval leases under the direction of the President without calling any of Denby's force in consultation unless he conferred with the Secretary of the Navy personally upon matters of policy; that the Secretary of the Navy understood the situation as therein stated (R. v. I, 133-135).

Mr. Doheny replied to Secretary Fall's letter of July 8, 1921, by a letter dated July 18, 1921, protesting that he had done nothing more than any one in the circumstances would have done in the matter of relinquishing right to lease to part of the land in Section 1, but expressing his appreciation of Secretary Fall's complimentary references to Mr. Doheny's action in the Secretary's letter to the President. The remainder of the Doheny letter is of a personal nature indicating the close friendship of the two men and their families. No reference to Secretary Fall's statement respecting future handling of naval reserve leases is contained in Mr. Doheny's letter (R. v. III, 1154-5).

TRANSACTIONS PRIOR TO THE NEGOTIATIONS RESULTING
IN CONTRACT OF APRIL 25, 1922.

Between July, 1921, and April, 1922, leases covering several strips of land in Naval Reserve No. 1 were entered into. These leases while signed by the Assistant Secretary of the Interior were directed to be made by the Secretary of the Navy under the authority conferred upon him by the Act of June 4, 1920. The validity of none of these leases is involved in this suit. As a result of them, stipulated percentages of crude petroleum produced from wells on the naval reserve lands were accruing to the Government as royalty. This was also true under a large number of leases covering lands in Naval Reserve No. 2, California. The Navy Department desired that this royalty crude oil, unsuitable for its use, should be exchanged for fuel oil suitable for naval use, the fuel oil to be stored until actually used on war vessels. In this way alone, according to officers of the Navy, could the reserves be made of use and benefit to the United States Navy. Of importance was the question how to provide storage for fuel oil from the time of acquisition to the time of use. In the Navy Department there was a body known as the "Navy Council", composed of the Secretary,

the Assistant Secretary, the Admiral of the Navy, the Rear-Admirals serving as chiefs of the various Navy bureaus, and the Major-General commanding the Marine Corps. In 1921, prior to the first of October, Rear-Admiral Griffin was Chief of Engineering and Commander Stuart, of Admiral Griffin's bureau, was in charge of the Navy fuel office dealing with the petroleum reserves. The first recorded mention of a plan to acquire fuel oil and storage facilities therefor in exchange for royalty crude oil is found in the minutes of a meeting of the Navy Council held June 30, 1921 (R. v. II, 977-8). On that occasion, when there arose a discussion regarding oil, Secretary Denby expressed the opinion that it would be a comparatively easy matter to include in the cost of oil the cost of storage thereof, the question being whether a contract including in the price [of oil] the tankage should be made so that "nothing" [apparently an error in transcribing, evidently should read "everything"] would come out of the royalty. Admiral Griffin showed that he had discussed this subject with Secretary Fall when he stated, in substance, in response to Secretary Denby's remarks, that Secretary Fall had said he would obtain information on that subject (R. v. II, 978).

On July 23, 1921, Secretary Fall addressed a letter to the Secretary of the Navy asking to be advised what arrangements the Navy desired for the handling and disposition of its royalty oil accruing from wells in the naval reserves. Attention was called to the fact that persons acquiring that oil would take care of it only for a limited period and there was suggested the desirability of effecting an exchange of royalty crude oil for an equivalent of fuel oil to be stored without expense to the United States by the other party to the exchange, preferably the exchange to be of crude oil for fuel oil in storage, title to both the fuel oil and tanks to be vested in the Navy as a result of the exchange. Mr. Fall stated that if the plan met Secretary Denby's

approval and the latter desired the former to undertake to consummate the arrangement, he would be glad to do so (R. v. I, 136).

This letter was referred to Rear-Admiral Potter, Chief of the Bureau of Supplies and Accounts of the Navy, who under date of July 9, 1921, in a memorandum to Secretary Denby, "strongly recommended that the plan suggested by the Secretary" of the Interior "be accepted," as it would be of great benefit to the Navy to have the royalty crude oil exchanged for fuel oil at tidewater, and, in view of the lack of appropriation to pay for the cost of construction of tank storage, "the acquisition of tanks by exchange for crude oil from Naval Reserve wells will be most acceptable" (R. v. II, 941-2).

Thereupon, on July 29, 1921, Secretary Denby wrote a letter to Secretary Fall, which is a paraphrase of Admiral Potter's recommendation, requesting that the consummation of the plan be undertaken (R. v. I, 137-8). The concluding paragraph of Secretary Denby's letter (ib. 138) shows that the fuel oil in storage which it was then contemplated to obtain by exchange of crude oil was for current use.

Secretary Fall left Washington July 31st for the Pacific Coast and before returning he wrote, September 24, 1921, to the President, reporting that he had visited San Francisco and consulted with the officer representing the Navy there in the matter of naval oil reserves and the representative of the Bureau of Mines; that after these consultations he took up with Mr. Shoup, of the Pacific Oil Company, and other representatives of the large operators, the question of providing storage for oil for the Navy, and secured a promise from the operators, particularly Mr. Shoup, to enter into a contract with the United States to construct two large concrete reservoirs, each of 750,000-barrel capacity, on the California Coast, at places to be selected by the Navy, where ships could be readily fueled; the Secretary informed the President that

these tanks would be constructed for the United States and be paid for in oil at current prices; that he had an offer from one or two other companies to do the same thing, and therefore the assurance that the Navy could at any time when it desired to do so procure storage capacity for at least 1,500,000 barrels at one or more places on the Coast, the Navy to select the location. The Secretary of the Interior concluded his letter to President Harding thus: "This will obviate the necessity of asking Congress for authority to expend money in such construction as we have now authority to exchange crude oil for fuel oil and the companies will construct the tanks and fill them with fuel oil, we paying in crude oil for both fuel oil and the tanks in which it is stored" (R. v. II, 482-3).

Secretary Fall remained in the West until late in October, 1921.

Meantime, on October 1, 1921, upon recommendation of Secretary Denby, the President appointed John K. Robison Chief of the Bureau of Engineering of the Navy with the rank of Rear-Admiral (R. v. II, 951). At that time the Chief of the Bureau of Engineering was not in charge of, and had no duties relating to, the naval petroleum reserves, which under the Secretary of the Navy were being handled in the Navy Department by Commander Stuart, a subordinate officer of the Engineering Corps (R. v. II, 955.) Admiral Robison knew Messrs. E. L. Doheny, Sr., and Jr., having become acquainted with them when the latter served under Robison's command aboard the U. S. S. Huntington during the World War, at which time on an occasion when the father visited the son a casual conversation regarding the naval oil reserves had taken place in which Mr. Doheny expressed the opinion that by reason of drainage of oil from under the naval reserves through wells operated by owners of adjacent lands the Navy, in his opinion, would in course of time lose its oil and gas (R. v. II, 953). This acquaintanceship ripened into a friendship which has continued (ib. 954).

Neither of the Dohenys had any connection with Admiral Robison's designation as Chief of the Bureau of Engineering nor, so far as Robison knew, did they know of it until the Admiral in a personal note dated October 6, 1921, informed the elder Doheny of his promotion (ib. 954; v. I, 145-6). At that time Admiral Robison had no duties in connection with the naval petroleum reserves, his first official duties in that connection beginning October 8, 1921, by orders received directly from Secretary Denby (R. v. II, 954). Subsequently, at a meeting of the Navy Council on October 18, 1921, the Secretary of the Navy stated that unless there was objection he would transfer the fuel oil activities to the Bureau of Engineering. No objection was voiced (R. v. I, 123), and on that date Secretary Denby issued a written order transferring the fuel oil office under the Secretary to the Bureau of Engineering, the latter to have charge of all the activities performed under that office (R. v. I, 114; v. II, 955).

Admiral Robison promptly took up the duties assigned him by the Secretary of the Navy in connection with the naval petroleum reserves and familiarized himself with their status, examining all the records and files on the subject (R. v. II, 956). He concluded that the Navy, under conditions theretofore existing, was getting little benefit from the reserves; that oil to the value of millions of dollars had been lost by drainage through wells on privately-owned adjacent lands; he discussed questions pertaining to the reserves with Secretary Denby right along; he had conferences with Commander Stuart of his Bureau; Director Bain of the Bureau of Mines, Interior Department; Mr. Ambrose, Chief Petroleum Technologist of that Bureau; First Assistant Secretary Finney and Secretary Fall of the Department of the Interior (R. v. II, 957-960). Out of these conferences there was evolved a plan which was set forth in a letter from the Secretary of the Navy to the Secretary of the Interior dated October 25, 1921,

thereafter referred to by Admiral Robison and Secretary Denby as the "policy letter" (R. v. II, 960-1; v. I, 146-9). This letter sets forth plan for drilling the California Naval Reserves; for exchanging royalty crude oil derived therefrom for fuel oil to be delivered to the Navy on the Pacific Coast; for devoting so much of the royalty oil as is not used by the Navy to the construction of oil storage at Pearl Harbor, Hawaii, and at other points to be thereafter designated by the Navy Department; for the exercise by the Interior Department of its best efforts to obtain for the Navy as large royalty and as favorable terms as practicable by public competition or otherwise; for the submission to the Navy Department for approval of qualities, deliveries, engineering and other features of the terms for conversion of crude oil at the well for fuel oil at tidewater and in tanks to be provided by lessees; for the arrangement and consummation of all leases and contracts, except as last mentioned, by the Interior Department, copies to be furnished the Navy Department as a matter of information and record only; for the making by the Interior Department of every effort to expedite the solution of the problem so that fuel oil at Pacific tidewater in exchange for royalty crude might be delivered as soon as possible to naval vessels and the erection of suitable storage facilities for 1,500,000 barrels of fuel oil undertaken and expedited. It is stated in the policy letter that the general intent of the arrangement therein outlined is to transform royalty oil into either (a) fuel oil for current naval use, or (b) fuel oil stored where required by the Navy as a reserve, the storage to be naval property and to accord with naval requirements (R. v. I, 147-8). Admiral Robison drafted that letter in rough and before its final drafting went over it with Secretary Denby who approved it (R. v. II, 960-1) and who inserted the words "or otherwise" in the paragraph providing that the Interior Department should exercise its best efforts to obtain for the Navy as large royalties and as

favorable terms as practicable by public competition, when Admiral Robison informed Secretary Denby that Secretary Fall recommended it (R. v. II, 965; v. III, 1111-13); Secretary Denby wanted in the policy letter the paragraph that provided that leases would be consummated by the Interior Department, copies to be furnished the Navy Department as a matter of information and record only, in order to be relieved of specific approval of each of the leases in the case of areas that were under the law controlled by the Interior Department and not have to investigate or pass upon problems that were, he believed, entirely within the purview of that Department (R. v. II, 965-6).

According to Admiral Robison, from the time he assumed the duties assigned to him by the Secretary of the Navy in connection with the naval petroleum reserves he saw Secretary Denby on the subject every time he saw Secretary Fall, Director Bain, Chief Petroleum Technologist Ambrose, or other officials of the Interior Department; he consulted the Secretary of the Navy, sometimes before, and always after, conferences with Interior Department officials; he made himself genuinely a personal representative of the Secretary of the Navy and had to inform himself of Mr. Denby's ideas and plans in order to accomplish that; he always made known to the Secretary of the Navy the subject of any conference, and plans under consideration were discussed before conferences relating thereto took place (R. v. II, 961).

Under date of October 30, 1921, Secretary Fall acknowledged Secretary Denby's October 25th policy letter, stated that he entirely agreed therewith, that the policies therein set forth would be carried out to the best of his ability, and that "of course" should any new matter come up at any time he would unhesitatingly and immediately consult Secretary Denby personally or through Admiral Robison (R. v. I, 149).

There was in the Navy Department a conflict of ideas respecting the use to be made of oil accruing

from the naval reserves: (a) One idea was to use it currently in naval vessels, and the plan involved in following that idea was to acquire, in exchange for royalty crude oil, fuel oil and storage therefor at points where naval vessels could readily bunker; (b) the other idea also involved the exchange of royalty crude oil for Navy fuel oil and storage facilities therefor, but contemplated that the oil would be held in storage as a reserve until the national defense required its use. At the time of the writing of the policy letter of October 25, 1921, it was thought that there would be sufficient royalty crude oil to carry out both plans so far as to provide fuel oil for current use and provide reserve storage for 1,500,000 barrels of fuel oil at Pearl Harbor. Admiral Robison discussed this subject with Secretary Fall in November, 1921, and in that discussion there was considered the cost of Navy specification storage tanks as compared with tanks conforming to commercial standards. Secretary Fall criticised the cost of naval storage facilities and expressed the opinion that they could be obtained for less. Admiral Robison requested Mr. Fall to get him some figures showing at what cost such tanks could be obtained, and Mr. Fall stated he would get them. On November 29, 1921, Secretary Fall received from Mr. Doheny, then president of the Transport Company, letter dated November 28, 1921 (R. v. I, 162-3). In this letter Mr. Doheny stated that along the lines of the Secretary's suggestion the writer had made inquiries regarding the cost of constructing tanks for storage of 1,500,000 barrels of fuel oil at Pearl Harbor, and found that the best price obtainable for these tanks, the Government to stand the cost of transporting the material from ship's side to tank site, and the cost of grading and otherwise preparing the tank site, was \$19,960 per tank; he stated the then prevailing crude and fuel oil price per barrel and the total which 27 tanks containing 1,485,000 barrels of fuel oil would cost and that "were we to

construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us," it would require a stated number of barrels of oil. Mr. Doheny concluded that he supposed the matter would be referred to Assistant Secretary Finney who with Rear Admiral Robison might arrange the details of it during Mr. Fall's absence, and as he, Doheny, also expected to be absent, he was confidentially furnishing Mr. Cotter (Vice-President of the Transport Company) with the information so that the latter could intelligently discuss the matter with Mr. Finney.

There was pending in the office of the Secretary of the Interior at this time application, presented to Assistant Secretary Finney by representatives of the Petroleum Company and the United Midway Oil Company, for relief from the high royalties reserved in the July, 1921, leases because of the small initial production shown by wells drilled thereunder; Judge Finney had taken this up with Secretary Fall; it had been determined not to grant a reduction in the royalties reserved in the July leases but to enter into additional leases in Reserve No. 1 with the same lessees at lower royalties, which would perhaps enable them to make up the losses on the first wells. Under this plan the United Midway Company was to have an additional lease of a strip lying south of the eight-well strip covered by its July lease and the Pan American Company was to have a lease on the remainder of Section 1, lying outside of the other leased areas (R. v. I, 322-3). This was the only lease which in November, 1921, the Petroleum Company was to get and it was in fact executed December 14, 1921, by Assistant Secretary Finney for the Government and Vice-President Cotter for the company, having been authorized by Secretary Denby (R. v. I, 322-3; v. II, 488-9; v. III, 1047-8).

On November 29, 1921, Mr. Cotter called on Secretary Fall and the latter addressed to Admiral Robison, and sent by the hand of Cotter, letter bearing that date by which there was transmitted the above mentioned letter which Mr. Doheny had written Mr. Fall. Secretary Fall stated to Admiral Robison that should the latter think best to accept the proposition contained in Mr. Doheny's letter it would be necessary, in the Secretary's judgment, to turn over to Mr. Doheny, "if we can do so, leases upon further wells or area in the naval reserve in which he is now drilling. If this is done it must be understood that the royalty must be made less than are the present royalties being paid by the Midway and Pan-American. The gas pressure is lessening to such a degree that the output of the wells of the two latter companies, as well as of other companies drilling in this neighborhood, is decreasing and is very disappointing. The two companies named are pumping their wells and of course they are not making any money, but will experience a loss in the payment of the fifty-five per cent royalty to the Government." This royalty was fixed in the leases between the Government and the Midway and Pan-American Companies entered into in July, 1921. Secretary Fall concluded with a request that if Admiral Robison approved the proposition he should indicate his approval by endorsement upon Mr. Doheny's letter, stating that the Admiral's simple O. K. would be sufficient (R. v. I, 163-4).

The two last mentioned letters were received by Admiral Robison immediately proceeding a Navy Council meeting which was held November 29, 1921 (R. v. II, 970-1), at which meeting there was a full attendance (ib. 971), and during which Admiral Coontz, Chief of Operations, brought up the subject of fuel oil, calling on Admiral Robison for a statement regarding the oil situation and on Admiral Latimer, Judge Advocate General of the Navy, for an opinion as to the legal right to use oil from the reserves. Admiral

Robison stated to the Council that the Navy had assurance from the Interior Department of a supply of fuel oil either for current use or reserve; he stated the quantities that would be available; he expressed the view that the policy should be to transform "this unavailable, more or less intangible naval fuel oil reserve into a tangible reserve to be located as in accord with our plan for national defense. The first step was to provide at Pearl Harbor storage for 1,500,000 barrels fuel oil. The tanks for containing this would be entirely paid for by the royalty on the oil." Referring to the letter of November 28, 1921, from Mr. Doheny to the Secretary of the Interior, and to Secretary Fall's letter of November 29th to Admiral Robison, the latter stated at the Council meeting that he had a definite proposition to supply the fuel oil in storage at Pearl Harbor (R. v. II, 971-2; 976); Secretary Denby stated that the subject had been discussed at the Cabinet meeting that morning and that in his mind there were two questions: First, the legal right, and, second, the desirability of using the oil currently; he expressed the view that to store it would conform to the reserve theory. In the ensuing discussion Admiral Robison referred to the information in Secretary Fall's letter to the effect that the gas pressure in the reserve was decreasing; the Judge Advocate General commented on the broad authority given the Secretary by the law; the Secretary expressed the view that to use the oil [currently] would be a subterfuge and that he wanted things like that to go to Congress, and when Admiral Robison requested instructions about the tanks at Pearl Harbor the Secretary announced that he would have to go into the matter further, that it constituted a matter of national policy which he did not want to decide until after he had seen the President and that he would probably take it up again with Congress. He expressed, after the Judge Advocate General read at the Council meeting the Act of June 4, 1920, the view that power existed to adopt the Pearl

Harbor fuel oil in storage policy, but directed Admiral Robison not to go ahead until the Secretary had seen the Congressional Committee (R. v. II, 974-5).

Mr. Doheny's letter of November 28, 1921, was thereupon returned to the Interior Department, where it came into the possession of Dr. Bain, of the Bureau of Mines, without comment or instructions (R. v. II, 719). The only purpose it served there was to inform Director Bain that Mr. Cotter had been placed in charge of its subject matter; Dr. Bain kept it in his office, with other papers relating to the subsequently developed and consummated Pearl Harbor oil project, it being, in his estimation, an engineer's preliminary estimate on the probable cost (R. v. II, 719); there was no official action ever taken on Mr. Doheny's November 28th letter, and it was kept in the files of the Bureau of Mines where the original remained at the time of the trial of this suit. Admiral Robison on November 29th, the day the letter reached him, announced at the Navy Council meeting that he was going to look into the matter to see whether the tanks referred to in Mr. Doheny's letter were specification tanks; subsequent to that time he did nothing with reference to that letter; no action was ever taken in the way of accepting that proposition or any official action on it (R. v. II, 992). He told Director Bain that " 'We could not take any such proposition as that,' and let it drop at once" (ib. 992-3). There is no evidence that Secretary Fall ever thereafter inquired about that letter, referred to it, or showed any interest in it.

Secretary Fall left Washington for the West December 1, 1921. When he left the status of the question, whether or not the Navy desired royalty crude oil exchanged (a) for fuel oil for current use, (b) for fuel oil in reserve with storage facilities therefor, had not been determined by the Secretary of the Navy and was in the position stated by him at the Navy Council meeting on the 29th of November as above set forth (R. v. II, 974-5). Before leaving Washington Secre-

tary Fall directed the issuance of instructions, which under date of November 30, 1921, were issued by Assistant Secretary Finney to the effect that local representatives of the Bureau of Mines in California were directed to send all crude oil certificates representing the Government royalty oils under leases in naval petroleum reserves, California, directly to the Secretary of the Navy, Washington, D. C., sending copies thereof to the Bureau of Mines, Department of Interior; that under an arrangement already made by the Bureau of Mines for exchanging the crude oil for fuel oil during November and December, 1921, papers evidencing the amounts of fuel oil to which the Navy would be entitled for those months would be delivered to the Secretary of the Navy, and copies sent the Secretary of the Interior; that as it appeared that the Bureau of Mines was negotiating contracts for the exchange of crude for fuel oil for the year 1922, it was directed that no such contract be consummated, but pending negotiations might proceed, the matter to be taken up with and by the Navy at a later time (R. v. I, 325-6).

Thus stood the matter of the handling of the naval reserves and oil produced therefrom when Secretary Fall left Washington December 1, 1921 (R. v. I, 324). Mr. Fall did not return to Washington until January 27, 1922 (R. v. I, 174). There is no evidence of any action taken or communication written by him between these dates.

DECISION OF SECRETARY OF NAVY TO EXCHANGE ROYALTY
CRUDE OIL FOR FUEL OIL AND STORAGE FACILITIES
THEREFOR AT PEARL HARBOR, HAWAII.

On November 30, 1921, Admiral Robison addressed two letters to the Judge Advocate General of the Navy. In the first, opinion was requested as to whether it would be legal to exchange royalty crude oil from naval petroleum reserves Nos. 1 and 2 for fuel oil in storage at Pearl Harbor or other points to be later

designated by the United States Navy, the tanks to be provided by the lessee of oil wells, and the oil in storage at Pearl Harbor, as well as the tanks and appurtenances, to become the property of the United States (R. v. II, 697-8). By the second of these letters opinion of the Judge Advocate General was requested as to the legality of the Navy's using currently oil accruing for its account from the reserves (R. v. II, 981-2).

The questions thus propounded were considered by the Judge Advocate General, his assistant, the Solicitor of the Navy Department, and an attorney in that office, and under date of December 2, 1921, a written opinion was rendered that under the provisions of the Act of June 4, 1920, the Secretary of the Navy had legal power (a) "to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be designated by the Secretary of the Navy under arrangements whereby the exchanged oil shall be stored in tanks provided by the lessees of the oil wells, such tanks and their appurtenances to become the property of the United States"; and (b) "to use the royalty oil on board vessels of the United States Navy and if so used, it should be expended at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct, and should be debited at the rate so fixed by the Secretary to the appropriation, 'Fuel and Transportation' " (R. v. II, 698-702).

December 5, 1921, Admiral Latimer, Judge Advocate General, and Admiral Robison discussed with Secretary Denby the Judge Advocate General's opinion, which the Secretary had gone over in detail and approved. Secretary Denby at that conference stated that it seemed necessary for the Navy to go ahead without waste of time to the accomplishment of the Pearl Harbor project and he instructed Admiral Robison to prepare the necessary order from the Secretary of the Navy to the Chief of the Bureau of Engineering to put that project into effect. Upon Admiral

Robison's stating that it would be sufficient for the Secretary to indicate his instructions on the Judge Advocate General's opinion, Secretary Denby affixed, over his signature, his approval to the opinion (R. v. II, 982-3; 702), and, opposite paragraph (a) above, in his own handwriting wrote, "Do this. E. D. Dec. 5th, 1921." (ib. 702; 983) as a definite order upon which Admiral Robison proceeded thereafter in the matter that resulted in the contracts and leases in suit. At the time that the Secretary of the Navy gave the foregoing instructions the importance thereof was discussed (R. v. II, 982-3).

Admiral Robison requested the Bureau of Yards and Docks to proceed with the work of preparing plans which had been started in a preliminary way a year before (R. v. II, 983).

Admiral Robison then by telephone informed Acting Secretary Finney of the Department of the Interior that the Navy Department wanted to go ahead with the Pearl Harbor project, and would not thereafter use any of the royalty oil for current purposes, adding that the Judge Advocate General and Solicitor of the Navy had rendered an opinion that this would be a legal procedure (R. v. II, 989). Mr. Finney called attention to the conflicting instructions received by the Interior Department from the Navy Department and asked that his Department be definitely advised in writing the plan the Navy desired followed (R. v. II, 989). Subsequently this was the subject of correspondence between Acting Secretary Finney and the Navy Department (R. v. I, 331-3; 335-7).

When Admiral Robison, on December 5th or 6th, informed Acting Secretary Finney of the opinion of the Judge Advocate General and the Navy's plan (R. v. I, 328; v. II, 509), Mr. Finney, without requesting or awaiting any instruction from Secretary Fall, informed the Director of the Bureau of Mines that the Secretary of the Navy had directed the making of arrangements

for the exchange of royalty oil for fuel oil for the Navy and for storing same "under arrangements with oil companies, which will build the tanks, taking oil in payment therefor, such tanks to become the property of the United States." Mr. Finney revoked the order given by direction of Secretary Fall to the Director of the Bureau of Mines on November 30, 1921, and instructed the Director of the Bureau of Mines to proceed with the plan above mentioned (R. v. I, 326-7; v. II, 509-10). Before sending these instructions to the Bureau of Mines Mr. Finney did not in any way communicate with Secretary Fall; the basic reason for his action was the direction of Admiral Robison, who told him that the Secretary of the Navy had approved that procedure. Following this Mr. Finney by telegraph briefly informed Secretary Fall of the Navy Department's request that the Interior Department proceed as originally planned with reference to exchange of oil and securing storage, and stated he had advised the Bureau of Mines thereof (R. v. I, 329). There is no evidence of any reply from Mr. Fall or of any action taken by him at the time.

The Navy Council met December 8, 1921. At the meeting there was discussed the aforementioned opinion of the Judge Advocate General, and draft of a letter prepared in the Bureau of Yards and Docks to be sent the Interior Department requesting its assistance in the negotiations for the exchange of crude oil for fuel oil and storage facilities at Pearl Harbor was presented, the Secretary of the Navy disapproving reference therein to any question of power under the law, a point which it was stated he had settled, about which he had no question, and which should not be made part of a letter to be sent the Interior Department. It was suggested that the letter be recast, and the Secretary of the Navy directed that anything going to the Secretary of the Interior must go through him (R. v. II, 983-8).

The last mentioned letter was redrafted and under

date of December 9, 1921, was sent, over the signature of Acting Secretary of the Navy Roosevelt, to the Secretary of the Interior, being received by the Acting Secretary of that Department, in the absence of Secretary Fall (R. v. II, 988; v. I, 329). By this letter the Navy Department informed the Interior Department of the preparation of plans for the storage of 1,500,000 barrels of fuel oil in steel tanks at Pearl Harbor, to be constructed and filled with fuel oil in connection with the exchange of royalty oil obtained from the naval petroleum reserve; plans and specifications were enclosed and it was stated that in preparing the project for bidders the Navy Department would render any assistance possible; attention was called to the fact that the character of the tanks differed from the standard type of construction on account of the military features of the project and the fact that the tanks were to be used for storing fuel oil for long periods of time; it was stated that the technical force of the Navy could be of material help and suggested that an officer would be detailed. It was requested that as the project was embodied in the war plans of the Navy Department all matters in connection therewith be regarded in as confidential a manner as possible (R. v. I, 329-31). Acting Secretary Finney, on December 10, 1921, acknowledged to the Secretary of the Navy the foregoing communication, advised that the matter would be promptly taken up by the Bureau of Mines, requested a copy of the Solicitor's opinion, called attention to the conflicting instructions thus far received from the Navy, and the desirability of a definite understanding (ib. 331-3). Secretary Denby under date of December 14, 1921, replied to Acting Secretary of the Interior Finney's letter of December 10th, confirmed the fact that it was his desire that the Interior Department proceed to handle oil and make exchanges for fuel oil and storage according to plans set forth in Navy Department letters of October 25 and December 9, 1921, furnished ex-

tract of the Judge Advocate General's opinion, stated the Secretary of the Navy's desire that all royalty crude oil should until further notice be used to pay for tankage for the Navy and for filling said tankage with fuel oil for storage, expressed the desire that the Interior Department proceed as soon as practicable to make a contract for the storage tanks at Pearl Harbor, and advised that he had designated Admiral Robison as his representative to handle all details in connection with petroleum reserve questions (R. v. I, 339-42).

Thereupon the Bureau of Mines of the Interior Department undertook in conjunction with Admiral Robison and the Bureau of Yards and Docks of the Navy the preliminary work and negotiations prefatory to the inviting of bids for the Pearl Harbor fuel oil project.

STEPS TAKEN BY GOVERNMENT TO OBTAIN COMPETITION ON PEARL HARBOR PROJECT.

Acting Secretary of the Interior Finney turned over to Director Bain of the Bureau of Mines the Navy's letters of December 9 and 14, 1921. Taking up the matter of conferences with prospective bidders, Dr. Bain knew from Mr. Doheny's letter to Secretary Fall dated November 28, 1921, that Mr. Cotter would handle negotiations for the Transport Company and requested Secretary Finney to write Mr. Cotter, which Secretary Finney did under date of December 16, 1921 (R. v. II, 718; v. I, 342). This was the only action ever taken on the Doheny letter of November 28th (R. v. II, 719-20; 506). It was then filed (ib. 720).

Mr. Doheny, Jr., visited Admiral Robison December 12, 1921, on behalf of a former shipmate of both of them who was then a naval reserve officer. The visit had nothing to do with any oil matter (R. v. II, 993). After the subject of the visit had been concluded, Admiral Robison brought up oil matters, and did not tell Doheny, Jr., anything about the details of the Pearl Harbor plan. He discussed naval oil reserve drainage

and requested the young man to ask his father for some advice Admiral Robison desired on the subject. Mr. Doheny, Jr., dined with Admiral and Mrs. Robison at their residence in Washington, returned to New York, and wrote the Admiral under date of December 14th (R. v. II, 993-4; v. I, 343-4). Admiral Robison replied, stating he would make an effort to be in Washington when Doheny, Sr., visited the following Saturday and would be glad to talk over with him the oil situation (R. v. I, 344).

December 17, 1921, Admiral Robison and Mr. Doheny, Sr., had a long conversation in the former's office at Washington on the subject of the Pearl Harbor project (R. v. II, 994-6). Mr. Doheny stated that he had already considered the project, but that his people were against it and that he had made up his mind to turn it down (ib., 996); that his company had no such considerable interest in California as, in the opinion of the rest of the company, would justify the large expenditure that would be required and that he had made up his mind to stay out of it (R. v. III, 1116-17). Admiral Robison urged Mr. Doheny not to stay out and appealed to him to help in the accomplishment of the security of the country, representing that as at stake. The naval needs and the meaning and results of war were dwelt upon. In view of the situation depicted by Admiral Robison Mr. Doheny pledged his company to bid on the Pearl Harbor construction without profit (R. v. II, 994-6).

Prior to having Acting Secretary Finney write Mr. Cotter, vice-president of the Transport Company, asking him to call on Director Bain, the latter by long distance telephone and telegrams requested that a representative of the J. G. White Engineering Company, well known to him, call at the Bureau of Mines for consultation on the subject of the Pearl Harbor project, and on December 16th (the day Mr. Cotter was written by Mr. Finney) Mr. Gano Dunn, president of the White corporation, telegraphed Dr. Bain that he would

be glad to come to Washington and a meeting was arranged for, and took place, December 23, 1921 (R. v. II, 722-3). Beginning then the President of the White corporation was frequently and fully consulted, his company was invited to compete, and he was helpful. The White Company and defendants were then strangers (R. v. II, 723-4; v. I, 349-50; 357-8; 366-7; 371-2; v. II, 931-2, and v. II, 889-934). With this as a beginning, Dr. Bain and the Bureau of Yards and Docks were occupied in December, 1921, in preparing the necessary data upon which to base the presentation of the Pearl Harbor project to other parties who might be expected to be interested in making bids. When this data had been placed in fairly complete form, Dr. Bain started for California (R. v. II, 726, et seq.). Before leaving for the West Dr. Bain by letter dated December 23, 1921, addressed to Secretary Fall, then in Three Rivers, N. M., advised that he was going west primarily to consult, with the Standard and such other companies as might be determined in conference should be taken into account, with regard to the tankage plant of the Navy; that he had seen Mr. Cotter, of the Transport Company, who was getting together additional data and had had preliminary conferences with the J. G. White Company, which had done a large amount of construction work for the Navy and was also dealing in oil; that he planned to stop at Three Rivers en route to Los Angeles and expected by that time to be able to give the Secretary some idea of the character of the contract which should be made in this case; that the Navy had given the Interior a free hand to go ahead (R. v. I, 345). Dr. Bain left Washington December 28, 1921 (R. v. I, 345; v. II, 724). He had previously, pursuant to an appointment made at his request, discussed the Navy plan with Mr. Cotter, whom he knew well (R. v. II, 720), with Mr. Dunn of the White Engineering Company (ib. 722), frequently with Admiral Robison (from whom he about this time learned that Admiral Robison

had secured a definite promise from Mr. Doheny that his company would bid on a plan of this kind if it could be reduced to a working basis) (ib. 721), with Commander Sherman, project manager of the Bureau of Yards and Docks, Navy Department (ib. 721), with Chief Petroleum Technologist Ambrose of the Bureau of Mines (ib. 725), and with Acting Secretary Finney. Dr. Bain introduced Mr. Dunn and Mr. Cotter to each other. Mr. Dunn had no previous knowledge of the Pan-American Company or acquaintanceship with its officers (R. v. II, 724; 899).

Mr. Cotter, in charge of the matter for the Transport Company, learning that Dr. Bain was going to the Pacific Coast, decided to go there to be present at conferences and he and Dr. Bain were on the same train from Washington as far as Three Rivers. (R. v. II, 837.)

When Dr. Bain left Washington he took with him a large roll of maps and plans covering the first Pearl Harbor project; his destination was Los Angeles and San Francisco; he stopped en route at Three Rivers, N. M., staying there overnight with Secretary Fall; he told the Secretary of the plans which had been developed in rough outline, and what he, Bain, thought it would be feasible to do, and secured the Secretary's approval in general terms subject to the working out of the contract. Dr. Bain told Mr. Fall that he was on his way to California to consult the large marketing companies there and see how many of them would be agreeable to entering into the arrangement contemplated. The Secretary approved what was being done. He told the Secretary what companies he intended to see in California, he having received no instructions from the Secretary on that subject; the government then had oil exchange arrangements with four big companies in California and they were naturally selected to be asked to consider and compete for contract for the Pearl Harbor exchange project; and Dr. Bain had determined in his own mind to see the officers of those

companies and so told Secretary Fall (R. v. II, 725-6). Dr. Bain remained in Three Rivers twenty-four hours and on January 2, 1922, he discussed the Pearl Harbor subject with Messrs. Doheny, Anderson, Bridge, Danziger and Cotter, officers of the Pan-American Company in Los Angeles; he left a set of the Navy plans and a copy of the Judge Advocate General's opinion and asked that the matter be taken up for decision as to whether that company would be prepared to offer a bid covering what the plans then showed. Dr. Bain had impressed upon Mr. Dunn, of the White Company, the confidential character of the Pearl Harbor project, and he referred to that in his conference with the Pan-American officials (R. v. II, 727) as he thereafter did to every one he consulted. Proceeding to San Francisco, Dr. Bain placed the project before officials of the Standard Oil Company, of the engineering firm of Ford, Bacon & Davis, of officers of the General Petroleum Company, and of the Associated Oil Company and the Pacific Oil Company, in each instance presenting a set of the plans and other data similar to that which had been left with the Pan-American Company officials and giving the representatives of each company the same opportunity to make a bid, and asking them if they would be willing to do so if the plan could be worked out on a business basis. In each instance Dr. Bain asked for advice from these business men as to the form in which the project could be worked out on a business basis. He informed the representatives of each company the names of the others that the matter had been placed before, and he treated them all alike in every respect. He received preliminary estimates from some of them (R. v. II, 727-37). Returning to Los Angeles Dr. Bain further presented the matter to officers and counsel of the General Petroleum Company in that city and to officers of the Union Oil Company there (ib. 740-1). On this second trip to Los Angeles he again saw Messrs. Doheny, Anderson and Cotter, and perhaps

other officials in the Pan-American Company (ib. 742). Dr. Bain returned to Washington January 22 or 23, 1922. At San Francisco and on the second visit to Los Angeles he had been accompanied by the Petroleum Technologist, Ambrose, and the latter returned to Washington with the Director. The result of Dr. Bain's interviews with the representatives of the oil companies in California was: he understood that Union Oil Company would not be interested in competing as they did not want to take part in a construction program (ib. 741-2); the General Petroleum Company would not compete because its counsel did not believe that the law authorized such an exchange arrangement (ib. 740); the Pan-American Company would offer a bid on the project when ready (ib. 742); the Standard Oil Company would be interested in the exchange of oil, but did not want to do any construction work for the Government and believed that a plan under which the construction work should be contracted to an engineering firm and the exchange of oil contracted to an oil company was a correct one (ib. 729); Ford, Bacon & Davis, an engineering firm, had substantial dealings with Standard Oil and that firm would give the matter consideration and decide whether it could make a bid (ib. 729-30); the Standard Oil would keep the matter under consideration; the Associated Oil Company (affiliated with the Pacific Oil Company) would have its engineer make for Dr. Bain's information a preliminary estimate of cost, would suggest changes in the plans thought to be advantageous, and take under consideration submitting a proposal (R. v. II, 731-8; 743).

After his return to Washington, Dr. Bain reported to Secretary Fall and Admiral Robison the result of the various conversations he had with the representatives of the above named companies (R. v. II, 743-4). There was then undertaken the work of getting up final plans in the Bureau of Yards and Docks on which bids could be made and the draw-

ing up of conditions of proposals, which was done in conjunction with officers of the Navy (ib. 744). Before sending out invitations for proposals Dr. Bain had a further talk with Secretary Fall, and frequently saw Assistant Secretary Finney. The Secretary was informed of the substance of the proposal which was being prepared and the persons to whom it would be sent, and expressed his approval (ib. 745). Prior to February 15, 1922, Secretary Fall told Mr. Finney and Director Bain to go ahead and handle this Pearl Harbor project matter, that he was going to be busy on other things. (R. v. II, 512; 745).

The directors of the White Engineering Company having decided they did not want a contract involving compensation in crude oil, the company's president, Gano Dunn, effected an arrangement to combine with the Transport Company, the latter to bid for the contract and, if successful, to have the White Company, as its representative, do the construction work (R. v. II, 893; 899-900; 908; 909-10). Similar arrangements were made between other oil and engineering companies (R. v. II, 773).

On February 15, 1922, Director Bain sent from his office in Washington to the Standard Oil Company, Ford, Bacon & Davis, the Associated Oil Company, the Pan American Company, and the J. G. White Engineering Company letter of invitation for proposals, with accompanying plans, specifications and conditions, the matter sent to each of these addressees being identical (R. v. II, 745-6; v. I, 350). The companies addressed were invited to submit bids March 1, 1922, for the exchange of royalty crude oil, accruing under leases in the naval reserves, for storage facilities to be provided at Pearl Harbor and 1,500,000 barrels of fuel oil to be delivered into said facilities (R. v. I, 350-3). There followed correspondence and consultations, resulting in the preparation of more complete plans and detailed specifications and a revised form of invitations for

bids, because of the Navy Department's objection to the receipt of bids on a "cost plus" basis which the invitation of February 15th contemplated.

Under date of March 7, 1922, there was sent, over the signature of Assistant Secretary Finney, to the same addresses to whom the letter of February 15th had been sent, the revised invitation for proposals for the "exchange of naval royalty oil for fuel oil in storage at Pearl Harbor," conditioned for the submission of bids April 15, 1922. Detailed plans and specifications and information for bidders, together with conditions under which proposals were to be received, were transmitted (R. v. I, 374-383).

Dr. Bain conducted a correspondence with Mr. McLaughlin, vice-president, Associated Oil Company, in which that company was urged to submit proposals on the Pearl Harbor project (R. v. II, 751-9). Mr. McLaughlin came to Washington prior to the opening of bids and held conferences with the Department on the subject. Mr. Dunn of the White company and Mr. Cotter of the Pan American Company, and representatives of the Foundation Company, of the Pittsburgh & Des Moines Steel Company, and others, did likewise (ib. 769-771). All of these concerns were furnished sets of plans, specifications, and conditions for bidding.

Conferences between Government officials and prospective bidders are usual, customary and even necessary on complicated projects like this (R. v. II, 564; 911-12; 751). Nothing occurred in this respect different from procedure in connection with other government projects (R. v. II, 912; 751).

During March, 1922, the Navy Department, through the Bureau of Mines, sent to all concerns invited to bid a list of firms considered acceptable as bidders on sub-contracts in connection with the Pearl Harbor project (ib. 760-1).

In addition to the work being done by Admiral Robison, the Chief of the Bureau of Yards and Docks,

Admiral Gregory, was in constant touch with Robison and Bain and in consultation with prospective bidders (R. v. II, 541-582). The Bureau, under Admiral Gregory's supervision, prepared all plans and specifications sent to prospective bidders (ib. 564).

The Foundation Company, one of the large engineering and construction companies of the country (ib. 770), stated in writing that it had an assurance of a source of disposal of crude oil, to be received in exchange on the project, and desired plans and specifications with a view to making a formal tender thereon (ib. 771). Bids were expected from the Foundation Company and the Pittsburgh & Des Moines Steel Company and not until bids were opened was it known that these companies would not submit proposals (ib. 770-1).

The time fixed for receiving bids was April 15, 1922. A few days previous to this date Secretary Fall had a conversation with Dr. Bain and Mr. Finney at which time he asked them how the proposed Pearl Harbor matter was getting on; being informed that bids would not be opened until April 15th he expressed disappointment, stating that he desired to close the Teapot Sinclair matter and this at about the same time; he was apparently impatient of the delay in the Pearl Harbor matter; Dr. Bain and Mr. Finney explained that the delay had been occasioned by various changes in the specifications and that the last invitation for bids had fixed the date of opening for bids for April 15th, before which they could not be opened. The Secretary did not make any suggestion as to any other way of closing the matter up than by waiting until the bids came in and were opened (R. v. I, 392; v. II, 772). At this time Secretary Fall was informed that bids from the Pan American, Associated and Standard Oil Companies were expected, that the Foundation Company and Pittsburgh & Des Moines Steel Company, engineering concerns, would probably bid on parts of the work,

while the White Engineering Company and Ford, Bacon & Davis were expected to bid in connection with the Pan American and Associated Companies, respectively (R. v. II, 772-3).

Secretary Fall contemplated leaving Washington prior to April 15th. Under date of April 12th he wrote to the Secretary of the Navy on the subject of the difficulty and delay in connection with the Pearl Harbor project, stating that one reason was that construction companies had no use for oil and oil companies were not engaged in construction work, and recommended that the Secretary of the Navy submit to Congress for inclusion in the then pending naval appropriation bill a provision to the effect that storage of fuel oil from naval reserves might be provided, either by the exchange of oil for such storage or by the sale of royalty oil and the use of the proceeds thereof for payment for storage facilities. Mr. Fall expressed the opinion that if Secretary Denby would present the matter to Congress he was confident Congress would enact the proposed additional legislation (R. v. I, 393-4). This was three days before bids were scheduled to be received. The Secretary of the Navy took no action on this suggestion but determined to await the receipt of bids and then to decide, in the light of what was disclosed by that event, whether or not it was necessary or advisable to follow Secretary Fall's suggestion (R. v. II, 1001-2).

Secretary Fall left Washington April 13, 1922 (R. v. I, 392), and did not return until some time after May 12th (R. v. II, 784).

Prior to leaving Washington the only instructions given by Secretary Fall regarding the prospective bidding on the Pearl Harbor project was that Assistant Secretary Finney should receive and open the bids and the Bureau of Mines should cooperate with Mr. Finney in the study thereof (R. v. II, 516; 774-5).

BIDS ON THE PEARL HARBOR PROJECT.

April 15, 1922, in the office of Acting Secretary of Interior Finney, bids were received and publicly opened and read in the presence of Acting Secretary (Finney), the Director of the Bureau of Mines (Bain), the Petroleum Technologist of that Bureau (Ambrose), Messrs. Tough and Campbell of the Bureau of Mines, and representatives of the Transport Company, the White Engineering Corporation, Associated Oil Company, Pittsburgh & Des Moines Steel Company, and W. R. Grace & Co. The proceedings were stenographically minuted (R. v. I, 406-8).

Four bids were received, one from the Standard Oil Company of California for the exchange of royalty crude petroleum produced in Naval Reserves Nos. 1 and 2 for fuel oil delivered into Government tankage at Pearl Harbor and/or into tank ships of the Government at stipulated California ports (R. v. I, 408-10); one from the Associated Oil Company offering—"subject to ratification and/or confirmation by Congress of the authority of the Secretary of the Interior and/or the Secretary of the Navy," to exchange oil produced in the naval petroleum reserves for storage facilities and appurtenances,—to construct the fuel oil storage plant called for by the plans and specifications "to be located at the United States naval station, Pearl Harbor," and to furnish 1,500,000 barrels of fuel oil into said storage, in exchange for 6,201,903 barrels royalty crude oil from Naval Reserve No. 2 (R. v. I, 410-11; 413). Two bids were received from the Transport Company, designated as Proposal A and Proposal B. This was decided upon by Mr. Cotter, in consultation with Mr. Dunn, of the White Company, two or three days before April 15th (R. v. II, 909-10). By Proposal A the Transport Company proposed to construct the storage facilities as specified and to fill the same with fuel oil, all in exchange for 6,092,709 barrels of royalty crude oil; and by Proposal

B the Transport Company proposed the same thing in consideration of 5,878,905 barrels of royalty crude oil (213,804 barrels less than stipulated by Proposal A, representing at the time a difference in money value of \$235,184.44), provided, further, that if the actual cost to the Transport Company of constructing the storage facilities turned out to be less than the cost represented by the number of barrels of crude oil estimated in this proposal for that part of the undertaking, the Company would give to the Government the benefit of the saving by crediting such saving in barrels of basic crude on account of the proposal sum (R. v. I, 40; 411-12; 413, 417). Proposal B was conditioned upon the contract containing a clause giving to the Transport Company a preferential right to lease from the Government any land within Naval Petroleum Reserve No. 1 which the Government might decide to lease (ib. 40).

A comparative table of the bids, prepared by Mr. Ambrose of the Bureau of Mines, will be found on page 413, volume 1 of the record, and an analysis and comparison of the bids, also made by Mr. Ambrose, will be found on pages 412-17. As the Standard Oil Company confined its bid to the exchange of royalty crude oil for fuel oil at Pearl Harbor on an exchange basis according to prices at the date of delivery of crude oil, and made no offer for the storage facilities, there is no basis for comparing its bid with the others received (R. v. I, 414). Transport Company's Proposal A called for 109,193 barrels of the Navy's royalty crude oil less than the quantity called for by Associated Oil Company's bid, representing, at the then prevailing prices, a money difference of \$120,113.20, by which amount the Transport Company's Proposal A was lower than Associated Oil Company's proposal, without any regard to the condition respecting congressional ratification found in the Associated Company's bid. Transport Company's Proposal B called for 213,804 barrels of Navy royalty crude oil less than Transport Company's Pro-

posal A, representing a money value of \$235,184.44, by which sum Proposal B was less than Proposal A. Transport Company's Proposal B called for 322,998 barrels of crude oil less than the Associated Company's bid, representing a difference of \$355,297.80, by which sum Transport Company's bid B was lower than that of Associated Company, the only other bidder proposing for the entire project. The Navy Department had estimated the cost of the project. Transport Company's Proposal B exceeded the Navy Department's estimate by less than one-half of one per cent (R. v. I, 413).

Immediately following the opening of bids Acting Secretary Finney announced that they would be carefully considered and that the bidders would be advised of the conclusions of the Department later (R. v. I, 408). He thereupon turned the bids and accompanying papers over to Mr. Ambrose and Dr. Bain of the Bureau of Mines with directions to study them and submit a report and recommendation (R. v. I, 412; v. II, 775). Admiral Robison was notified the same day and he, after going into the matter of the bids and the analysis thereof, went over it with Secretary Denby, taking to him every bit of information that he had (R. v. II, 1002-3).

Acting Secretary Finney at that time had no instructions whatever from Secretary Fall as regards what consideration any of these bids should receive or what recommendation should be made respecting them. When Secretary Fall left Washington, April 13, 1922, he left in the hands of Mr. Finney and Dr. Bain the matter of opening these bids and giving them consideration without any restrictions at all being placed on either (R. v. II, 515-16).

Acting Secretary Finney's only instructions to Dr. Bain and Mr. Ambrose, when he turned over to them the proposals which had been received and opened, were to examine them carefully, make an abstract of

them, and return them to Secretary Finney with report and recommendation. No instructions were given to Dr. Bain and Mr. Ambrose on the date the bids were opened or at any time prior thereto as to what the report thereon should be (R. v. II, 515; 775-6).

Dr. Bain instructed Mr. Ambrose in examining the bids to obtain information from the Navy Department about technical details but he did not, nor did any one else, give any instructions in regard to whose bid should be recommended (R. v. II, 776).

Prior to the time when Secretary Fall left Washington on April 13, 1922, he did not say anything to Admiral Robison about whom the Pearl Harbor project contract was to be awarded to, nor did any one in the Interior Department say anything to Admiral Robison before the opening of bids regarding whom the contract would be awarded to (R. v. II, 1009).

There is no evidence of any communication on the subject of the first Pearl Harbor project from Secretary Fall to Secretary Denby except as contained in documents hereinbefore set forth. Prior to the decision of Secretary Denby that contract should be awarded to the Transport Company in accordance with the terms of its Proposal B, there was no communication of any kind on the subject of the bid or the award between Admiral Robison or Secretary Denby and Secretary Fall (R. v. II, 1008-9).

The Chief Petroleum Technologist, with the assistance of Lt. Keating of the Navy Department, Mr. Tough, Chief Supervisor of Oil Leasing, Bureau of Mines, and Mr. Campbell of that Bureau, studied the bids and discussed them with Dr. Bain (R. v. II, 776-777).

During the period while the bids were being examined, considered, and report and recommendation thereon drafted, Secretary Fall was not communicated with nor did he communicate with any one concerned (R. v. II, 777).

April 17, 1922, Mr. Ambrose submitted to Secretary

Finney his report which analyzed the bids, compared them, and recommended acceptance of Transport Company's Proposal B as the lowest and most advantageous to the Government. Mr. Ambrose detailed his reason for so recommending. He recommended that clause giving preferential right to future leases to be inserted in the contract should be clearly outlined and stated how that should be done, limiting the scope of the "preferential right" in its terms and in the acreage to be covered thereby (R. v. I, 412-19).

When Mr. Finney received the foregoing report he went into conference thereon with Mr. Ambrose and Admiral Robison (R. v. I, 419).

Admiral Robison took the matter directly to Secretary Denby and went over with him the terms of the bids which had been received, recommending to Secretary Denby the acceptance of Pan American Bid B and giving Mr. Denby every bit of information the Admiral had; the reasons for recommending Pan American bid B as the best one were placed before the Secretary by Admiral Robison; its terms were discussed; the preferential right to future leases was discussed by Secretary Denby and Admiral Robison and they exchanged their conclusions with regard to its effect (R. v. II, 1003-4). Admiral Robison took the matter up with Secretary Denby immediately he got information concerning the different bids from Ambrose and before Secretary Fall was communicated with and prior to the receipt of telegram hereinafter referred to from Secretary Fall (R. v. II, 1004-5). Secretary Denby instructed Admiral Robison to go ahead with bid B and the Admiral informed Secretary Finney of that on April 17th (R. v. II, 1005; 1099).

After receiving Mr. Ambrose's report on the bids and discussing the matter with Ambrose and Admiral Robison, Acting Secretary Finney, April 17th, sent the following telegram to Secretary Fall, then at Three Rivers, N. M. (R. v. I, 419-20):

"California reserve bids received and opened Saturday. Standard bid was for exchange only. Associated bid for oil in number two reserve only, six million two hundred and one thousand nine hundred barrels. Pan American bid oil from both reserves, six million, ninety-two thousand seven hundred barrels, with an alternative Pan American bid, five million eight hundred and seventy-eight thousand and nine hundred barrels, if given preference for drilling required by government in future in reserve number one. Pan American bid also advantageous, in that it provides for reduction in cost in case storage facilities erected for less money than estimated. In opinion Ambrose, Robison and myself, Pan American alternative bid best offered and should be accepted.

Referring telegram Safford and myself this morning, regarding Kendrick resolution. Similar demand for report had been made upon Secretary Denby. Denby desires complete publicity Navy Department's part in opening naval reserves. Suggest you authorize closing contract with Pan American. Details will require approximately three or four days to arrange. On conclusion this contract suggest you publish complete information concerning opening of all reserves. In any event, suggest you telegraph your desires to Secretary Denby at once.

If you agree with recommendation regarding California reserves, why not authorize me by wire to make award, and yourself immediately make public the entire disposition of all naval reserve contracts, with reasons therefor."

Mr. Safford, who joined in the foregoing, was at the time Administrative Assistant to the Secretary of the Interior.

April 18th Secretary Fall replied by telegram thus (R. v. I, 420-1):

"Telegram Number Two reference California bids, if Admiral Robison and Secretary Navy think best close immediately on basis Pan American deal and if authorized by Denby proceed immediately award and close contract and make public entire policy in fullest and completest manner. * * *"

As above shown, Secretary Denby had directed that *contract* be made on the basis of Transport Company's Proposal B and Admiral Robison had so informed Secretary Finney on April 17th (R. v. II, 1005; 517; v. III, 1099).

On April 18th Secretary Finney in writing advised the Transport Company of award of contract in accordance with the terms of its Proposal B and stated that formal contract was being prepared for execution (R. v. I, 421-2).

On the same day, April 18, 1922, Mr. Finney, Admiral Robison and Director Bain prepared a memorandum for the press which, after it was approved by Secretary Denby, was that day released for immediate newspaper publication as a statement authorized by the Secretary of the Navy (R. v. II, 518; 1005), which published statement contained, among other things, this:

"NAVAL RESERVES IN CALIFORNIA.

"Proposals from a number of oil companies for the handling and exchange of crude oils in the Naval Reserves in California for fuel oil in storage at Pacific Coast points designated by the Navy, were received by the Department of the Interior Saturday, and an award of contract was today authorized to the Pan American Petroleum Company, the best and lowest bidder. This involves the exchange of the Navy's royalty oil from the reserves for fuel oil in storage at points designated by the Navy on the Pacific Coast, in storage, of the type selected by and approved by the Navy Department" (R. v. II, 519; 522-23).

April 19th Finney and Safford telegraphed Fall that contract had been awarded "lowest and best bidder" and would be ready for execution "tomorrow" (R. v. II, 524).

In the Interior Department, in virtue of the President's Executive Order of May 31, 1921, Acting Secretary Finney was having drafted a form of contract with the Transport Company to be ex-

ecuted on behalf of the United States by the Acting Secretary of the Interior. Mr. Cotter, representing the Transport Company, insisted that the Secretary of the Navy should be specifically a party, both in the body of the contract and by way of the signature at the end. Mr. Finney agreed with this view (R. v. I, 424; v. II, 778; 1006). Admiral Robison told Secretary Denby of Mr. Cotter's request, which the Secretary of the Navy agreed to (R. v. II, 1006). Assistant Secretaries Finney and Safford on April 20th telegraphed Secretary Fall that the Transport Company thought the Secretary of the Navy should be made specifically and directly party in and to the contract and Mr. Fall replied on the 22nd that he thought it very well to make the Secretary of the Navy and the Secretary of the Interior both directly parties to the contract (R. v. II, 525-6).

After the approval of the recommendation of Mr. Ambrose regarding the character of the clause granting preferential right to future lease to be embodied in the contract, and the sending on April 18, 1922, of the letter of award to the Transport Company, there was immediately started the preliminary work of getting up the contract, this being done in the Bureau of Mines in conjunction with the Navy (R. v. I, 422). Mr. Cotter, the Transport Company's vice-president, said that the preferential right clause, as it was proposed to put it in the contract, which clause was drafted in the Petroleum Division of the Bureau of Mines, did not give his company anything (R. v. II, 782). Between April 18th and 23rd there was a conference in Acting Secretary Finney's office at which were present Mr. Finney, Mr. Cotter, Admiral Robison and Mr. Ambrose, and at which the terms of the proposed contract and the clause granting preferential right for leasing "certain areas" were discussed. Mr. Cotter wanted some definite understanding or stipulation written into the contract as to the areas which would be leased and the time

limit fixed. Without some definite agreement respecting the future leasing to the Transport Company of some land Mr. Cotter stated his wish that the Government should not accept his company's Proposal B as the company would not be getting anything at all for the reduction which that proposal represented as compared with Proposal A, and Mr. Cotter said he wished the Government had not accepted bid B; that he would prefer to have Proposal A accepted (R. v. II, 779; 1006; v. III, 1100). This was discussed among Mr. Ambrose, Admiral Robison and Judge Finney and it was finally tentatively agreed that within one year from the date of the contract the Government would award lease to the northeast quarter of Section 3, Naval Reserve 1, 160 acres, and to a strip of the east half of Section 34, in the same reserve, covering 140 or 150 acres, at royalties running up from $12\frac{1}{2}$ to 35 per cent (R. v. I, 422-3). Dr. Bain expressed to Admiral Robison the opinion that these strips of land should be leased as a protection against drainage by outsiders (R. v. II, 1007). Those strips in the judgment of the Bureau of Mines would need to be leased sometime within not to exceed a year (R. v. II, 780). The strips were selected by the Government and not by Mr. Cotter or any other representative of defendants (R. v. II, 781; v. III, 1101). The royalties on which the Government would agree to lease the strips were arrived at by the Bureau of Mines and were not royalties asked by Mr. Cotter, who sought a lower schedule and was told that those lands would not be leased on the royalty be requested (R. v. II, 781). Mr. Cotter wanted some definite assurance in writing. The contract had been drafted and therefore the assurance was embodied in a letter which Mr. Finney dictated in the presence of Mr. Ambrose and Admiral Robison, dated April 25th, and signed by Mr. Finney and Mr. Denby (R. v. I, 423; 65-68).

The letter, accomplished simultaneously with the execution of the contract between the Government

and the Transport Company, was in substance an agreement providing for the leasing within a year of two small tracts of land in Sections 3 and 34 in Naval Reserve No. 1 at royalties set forth in the letter. This was agreed to because in the judgment of the Navy and Interior Departments it was to the advantage of the Government to accept Transport Company's Proposal B, and to include in the contract the clause regarding preferential right to future leases in the form recommended by Mr. Ambrose and drafted in the Bureau of Mines, and the agreement for some definite leasing was to induce the Transport Company to enter into such a contract (R. v. I, 65-68).

Draft of the proposed contract having been made, Admiral Robison obtained it from the Interior Department and went over it with Mr. Neagle, the Solicitor of the Navy Department, who gave Admiral Robison advice with respect thereto. The Admiral then took the draft of the contract to Secretary Denby and they read it over and made several changes in it, after which Secretary Denby approved it and instructed Admiral Robison to "go ahead and put it through" (R. v. II, 1007-8).

The contract in final form having been prepared and letter agreeing to make leases to the above mentioned specified tracts at specified royalties having been decided upon, Mr. Finney thought it advisable to advise Secretary Fall as to the matter and as to all details relating to the proposed contract and on April 20, 1922, he sent Mr. Ambrose to Three Rivers to acquaint Secretary Fall therewith. Mr. Ambrose took with him a copy of his report on the bids dated April 17th, the proposed form of contract, and either a copy of the letter regarding the leases to be made within a year or information respecting the contents thereof (R. v. I, 423-4). It is in testimony that Ambrose was also instructed to ask Secretary Fall as to the joining of Secretary Denby in the contract (ib. 424)

but the contemporaneous written record of telegraphic correspondence, which it was stipulated by counsel for plaintiff and defendants actually took place at the times indicated on the exhibit evidence thereof (R. v. II, 527), shows that on the morning of April 20, 1922, prior to Mr. Ambrose's departure for Three Rivers, the matter of Secretary Denby's being made "specifically and directly party in and to the contract" was made the subject of a telegram from Assistant Secretaries Finney and Safford to Secretary Fall (R. v. II, 525), and that on April 22, 1922, the day before the arrival of Mr. Ambrose at Three Rivers where he saw Mr. Fall, the latter had by telegraph informed Messrs. Finney and Safford that he thought it very well to make the Secretary of the Navy and Secretary of the Interior both directly parties to the Pan American contract (R. v. II, 526). Every question with respect to the awarding of the contract and the parties thereto had been settled in the telegraphic correspondence before Mr. Ambrose arrived at Three Rivers on April 23rd (R. v. II, 528). Mr. Ambrose, after the above mentioned telegraphic correspondence had been concluded, arrived in Three Rivers, N. M., April 23, and on that date Secretary Fall telegraphed Acting Secretary Finney "Ambrose arrived. Have consulted reference all contracts. As to both contracts, go ahead. New appointment to be made by you." (R. v. II, 526-7). Mr. Finney, in testifying, expressed the opinion that the Secretary of the Interior could have unsettled what had been settled and his wishes would have been followed and that the matter was not settled until he, Secretary Finney, received the "Go ahead" telegram of April 23rd, but testified as a fact that that changed nothing that had theretofore been decided (ib. 528-9).

Admiral Robison did not know that Mr. Ambrose was leaving for Three Rivers, carrying documents and information; he did not give Ambrose any instructions or requests, before the latter left; nor did

he communicate to Secretary Fall by Mr. Ambrose, nor send the Secretary any message about the Pan American contract through Ambrose or by or through anybody else (R. v. II, 1008-9). Admiral Robison was directly and personally handling for Secretary Denby every phase of the matter (ib. 1005).

EXECUTION OF CONTRACT OF APRIL 25, 1922, BETWEEN
UNITED STATES AND TRANSPORT COMPANY.

On behalf of the Transport Company this contract was executed by J. M. Danziger, its vice-president (R. v. I, 35). Secretary Denby, as above shown, had been over the first draft of contract with Admiral Robison, after it had been examined by the Solicitor of the Navy Department, had indicated desired changes thereon, and had approved it (R. v. II, 1007-8). When in final form Admiral Robison took the contract to Secretary Denby, and at the same time took to the Secretary the letter of April 25, 1922, by which the Government agreed to award the Transport Company specified leases within a year (R. v. I, 65-68), and they were both accomplished at the same time. Secretary Denby, when the contract was presented to him by Admiral Robison for signature, asked whether it included the changes they had made, and was shown that it did and that it was exactly as he wanted it, and, having been further assured that there were no other changes included therein, the Secretary of the Navy signed it (R. v. II, 1009-10; v. I, 36). It was also signed by Acting Secretary of the Interior Finney (R. v. I, 36; 424-5). On or about its date the contract and the accompanying letter of April 25, 1922, were formally delivered (ib. 425).

THE CARRYING ON AND COMPLETION OF PROJECT PROVIDED
FOR BY THE TERMS OF CONTRACT OF APRIL 25, 1922.

The work under this contract was entirely completed, the tanks having all been filled with oil, and finally accepted December 15, 1923 (R. v. II, 575).

Admiral Gregory, Chief of the Bureau of Yards and Docks of the Navy, considered the value of these fuel oil storage facilities to be fully that of the lump sum price provided for in the contract, but there was a saving represented by the actual cost of the work below that price, estimated by Gregory at the trial as between \$300,000 and \$400,000 (R. v. II, 569), actually \$466,000 (ib. 923), which the Government got.

The Transport Company has received from the Government crude oil equivalent to the full cost incurred under the April 25th contract, that cost and the receipt of its equivalent in crude oil being undisputed (R. v. III, 1198).

As the facts regarding the operations under the April 25th contract are the same as those relating to operations under the December 11th contract, and shown by the same evidence, those facts are stated hereinafter.

EXECUTION OF LEASE OF JUNE 5, 1922, AND OPERATIONS THEREUNDER.

This is the second of the four documents the validity of which is in issue in this suit.

By letter dated April 25, 1922, signed by Secretary of the Navy Denby and Acting Secretary of the Interior Finney (R. v. I, 68), addressed to Vice-President Cotter of the Transport Company (ib. 65), it had been agreed that within one year there would be granted to the Transport Company leases to drill wells on the northeast quarter of Section 3 and on a strip in Section 34 of Naval Reserve No. 1, on a schedule of royalties set forth in that letter (ib. 67). Secretary Fall took no part in the negotiations for this letter and was not in Washington at the time. There is no evidence that Secretary Fall ever saw this letter, the testimony leaving in doubt whether or not a copy was sent to him in New Mexico. Mr. Ambrose, who arrived at Three Rivers, N. M., on April 23, 1922, knew what was to go in the letter and was instructed to talk the

matter over with Secretary Fall (R. v. I, 413-4). There is no evidence as regards what Mr. Ambrose said to Secretary Fall, Ambrose having been subpoenaed by order of plaintiff's counsel as a witness on behalf of plaintiff but not having been called to testify (R. v. I, 103). On May 29, 1922, Vice-President Cotter of the Transport Company applied for lease on north-east quarter of Section 3, Naval Petroleum Reserve No. 1, pursuant to the letter of April 25, 1922 (R. v. I, 432). Under date of June 5, 1922, lease under the Act of June 4, 1920, of that land was executed between the United States and the Transport Company. It was signed for the Government by First Assistant Secretary of the Interior Finney, and for the Transport Company by Vice-President Cotter (R. v. I, 68-83). Shortly thereafter this lease was with the consent of the United States assigned to the Petroleum Company which assumed all the obligations and rights of the original lessee thereunder (R. v. I, 432).

Operations under this lease are covered by the same evidence as relates to the December 11, 1922, lease, set forth hereinafter (R. v. III, 1197; 1199-1200).

ACTS OF THE NAVY DEPARTMENT WHICH EVENTUATED IN
NEGOTIATIONS RESULTING IN EXECUTION OF
CONTRACT OF DECEMBER 11, 1922.

"The plan to enlarge the Navy's fuel oil storage plant facilities, by whatever name called, after the April 25 contract had been made, was brought about as a result of a decision of the General Board, approved by the Secretary of the Navy, which in turn resulted in directions to the Bureau of Yards and Docks, to proceed to plan this second project; as at that time there was under way the first project, from an engineering construction standpoint, it would not be a satisfactory or practical way of carrying forward the work, to have the second project taken up by an independent or new contracting firm, because the extended work is

really to be so integrally connected with the original work, by reason of the piping, the electrical connections, the fire-fighting connections, and all that, as to make a separate contract with a separate party to involve, undoubtedly, a great deal of expense, and it would not be considered a practical way of going at it. The only logical way is to make it an extension of the first contract." (R. v. II, 581-2.)

After the contract of April 25th was signed, there arose in the Navy Department question of more oil storage facilities at Pearl Harbor than were covered by that contract and instructions were given by the Secretary of the Navy increasing the quantities and establishing a new limit as to the proper amount for that locality (R. v. II, 1111-12). About May, 1922, Admiral Robison called the attention of those responsible for adequate preparation of the Navy for active service to what constituted the entire reserve of petroleum products up to that time, aside from what was required for current use. He invited the attention of the head of the War Plans Section to the necessity of a complete study of requirements. This was done, and the result of it was an increase in the amount of fuel oil set to be carried in Pearl Harbor. In this connection, there was discussed the question how long, in the event the Navy was called into active service on the Pacific, 1,500,000 barrels of oil would last the Fleet; these discussions began in the spring of 1922 (R. v. II, 1012).

On November 20, 1922, Admiral Robison informed the Secretary of the Navy, through the Chief of Naval Operations, that the storage for 1,500,000 barrels of fuel oil at Pearl Harbor under the April 25th contract was nearing completion and stated the desirability at that time of information as to what further disposition should be made of the royalty oil accruing from Naval Petroleum Reserves Nos. 1 and 2. He requested instructions as to

the quantity and location of reserve storage facilities to be provided on the west coast, including the Hawaiian Islands (R. v. II, 611). The Chief of Operations forwarded this last mentioned communication to the Secretary of the Navy recommending that the next project to be undertaken in disposing of the royalty oil accruing from Reserves 1 and 2 be increasing the totals of the reserves of all petroleum products at Pearl Harbor to figures which are set forth in the communication. This was approved (R. v. II, 612-13). On November 21, 1922, the Secretary of the Navy in a communication to the Board for the Development of Navy Yard Plans stated that he had that day approved a change in the amount of reserve of fuel oil to be provided at Pearl Harbor from 250,000 tons to 625,000 tons, and that in order to secure storage space for the 625,000 tons of fuel oil at Pearl Harbor it would be necessary to use certain described land of the naval station there. The Board was directed by the Secretary to prepare, for the consideration of the Department, a new plan showing the location of the tanks necessary to accommodate such portion of the 625,000 tons of fuel oil as could be accommodated on the land under the control of the Navy Department at Pearl Harbor, and also showing such other changes in the then existing approved plan as might be necessitated by this increase in the fuel oil reserve. (R. v. II, 608-610.) On November 22nd Admiral Robison having seen the Secretary of the Navy's approval of the increase in the amount of reserve fuel to be held at Pearl Harbor (R. v. II, 1014), addressed a communication to the Bureau of Yards and Docks stating that the Bureau of Engineering, of which he was Chief, had recently been informed that the approved war plans provided for increased storage facilities for petroleum products in the Hawaiian Islands, according to a list set forth in the communication, the quantities being the same as set forth

in the above mentioned communication from the Chief of Naval Operations to the Secretary of the Navy. Admiral Robison requested that his Bureau be informed whether or not these facilities could be provided within the limits of the naval station at Pearl Harbor. He further requested that, if there was available space for these facilities, the Bureau of Yards and Dock should see to the preparation of the necessary plans. Admiral Robison showed that the fuel oil storage facilities available at Pearl Harbor prior to the April 25th contract provided a capacity for 426,000 barrels; that the newly approved war plans called for a capacity of 2,450,000 barrels in addition to the fuel storage existing before and that provided under the April 25th contract (R. v. II, 614-5).

The Navy's plans for additional fuel oil and other petroleum products in storage at Pearl Harbor having been thus formulated and approved, the Secretary of the Navy informed Admiral Robison of that approval and gave the Admiral oral instructions upon which the latter dictated letter from the Secretary of the Navy to the Secretary of the Interior dated November 29, 1922, which letter he took in person to the Secretary of the Navy and went over its subject with him, the Secretary thereupon signing it (R. v. II, 1023-4). By this letter the Secretary of the Interior was informed of the desire of the Navy for additional fuel oil and other petroleum products and storage therefor at Pearl Harbor and it was requested that steps be taken to modify the April 25th contract to the end that the desired increase should be added to the present plan for the Pearl Harbor development and that as much fuel oil in storage as practicable be ordered for the benefit of the Navy (R. v. II, 616-8). This letter will be referred to more in detail hereinafter. Admiral Robison may have mentioned the plan for additional facilities at Pearl Harbor to Secretary Fall prior to November 29, 1922, but he does not think he did (and

there is no evidence that it was known to Secretary Fall prior to that time); Secretary Fall had not said anything to Admiral Robison on the subject or asked him to get up that sort of an application. "This plan originated in the Navy Department and was based upon necessities." (R. v. II, 1024.)

ACTIVITIES OF OFFICIALS OF DEFENDANTS BETWEEN JUNE
5 AND NOVEMBER 29, 1922.

Prior to the middle of November, 1922, as hereinafter narrated, no officer of defendant companies had any information respecting the consideration by the Navy Department of plans for an increase of oil in storage at Pearl Harbor, as above set forth (R. v. II, 1022).

In the summer of 1922 a phenomenal production of oil from newly discovered pools in California resulted in a marked reduction in prices. This directly affected the Government as royalty crude oil was then being applied to payment for work being done at Pearl Harbor on the basis of the current published prices. The reduction in those prices increased the number of barrels required to satisfy the terms of the April 25th contract. Vice-President Cotter of the Transport Company addressed the Secretary of the Interior on this subject and requested that during the period of flush production from the newly discovered pools, and pending the development and submission of a plan to bring better prices than contemplated by the Transport Company, authority be given to suspend operations in the naval reserves (R. v. II, 582-4). By telegram of July 28, 1922, Secretary Fall instructed Mr. Campbell, representative of the Bureau of Mines at Bakersfield, California, to cooperate with lessees in Naval Reserves Nos. 1 and 2 to reduce production, in view of the then existing prices, by shutting off partially or entirely where possible without danger of loss through incursions of water or from drainage (R. v. II, 586-7). On

the same date by telegram to Mr. Doheny Secretary Fall acknowledged Mr. Cotter's letter, and stated that the Government was prepared to accede to the request for curtailment of production and desired such policy to be followed in both the California naval reserves where results would not be disastrous because of water incursions or immediate danger of drainage. Mr. Doheny was informed that Mr. Campbell, the representative of the Bureau of Mines at Bakersfield, was being instructed to carry out the curtailment program and was advised to have his company's representative consult with Mr. Campbell (R. v. II, 580-5). This program was confirmed by letter of July 28, 1922, from Secretary Fall to Mr. Doheny (ib. 585-6). There followed correspondence on the subject of cutting down production with other operators in reserves 1 and 2 (ib. 587-597). Mr. Doheny, owing to absence in Alaska, did not receive the above mentioned telegram and letter of July 28th until September 6, 1922, when, after his return from Alaska, he acknowledged the same (R. v. III, 1155; note: December 6, 1922, is misprint, should be read September 6, 1922). In this letter Mr. Doheny stated his pleasure at noting that the authority to curtail production had worked some good in connection with the temporary flood of oil which had increased the production beyond the capacity of the refineries in California; that this was undoubtedly the cause for the decrease in the price of oil; that in connection with that situation he had developed some ideas which he desired to place before Secretary Fall, and which he thought would work out to the advantage of the Government and the oil producers, generally, in California; that he was preparing a statement of the situation and of the plan which he would like, under certain conditions, to undertake to carry out, which would give relief of a substantial character and provide additional market for the flush unrestricted production of the oil fields there (R. v. III, 1155-6). The remainder of the

letter is devoted to the Alaska trip from which the writer had just returned, to a description of that trip and of the country visited; the letter indicates the friendly personal relationship of the Doheny and Fall families (ib. 1156-8).

In the fall of 1922 Mr. E. L. Doheny submitted to representatives of the Navy and the Interior Departments, to Admiral Robison of the Navy, and to Secretary Fall of the Interior, an undated memorandum on the subject of the oil situation in California (R. v. II, 597). Admiral Robison and Secretary Fall had a talk about the subject of this memorandum, Secretary Fall stating that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own. Secretary Fall was favorably disposed toward it. Admiral Robison stated that anything to the Navy's advantage was of interest to him; he does not remember the details of the conversation, but there was no question that it was a matter for naval decision (R. v. II, 1020, 1021-2). Secretary Fall turned the copy of this memorandum which had been sent to him over to Dr. Bain, Director of the Bureau of Mines (R. v. II, 597). When Secretary Fall handed the memorandum to Dr. Bain, sometime in October, 1922, the Secretary said, take it up with Admiral Robison, and said nothing more on the subject at the time. Dr. Bain and Admiral Robison discussed the subject of the memorandum, and the latter stated he intended to discuss it with his associates and with the Secretary of the Navy (R. v. II, 789). Late in October or early in November, Mr. Cotter, of the Transport Company, called on Dr. Bain and mentioned this memorandum and asked what had been done with it. Dr. Bain told Mr. Cotter that the Secretary had given it to him to take up with the Admiral, that he had taken it up with the

Admiral, and that nothing more would be done unless the Navy wanted something done. Mr. Cotter was told, if he wanted to push the matter, or have any further information about it, to go to the Navy (R. v. II, 789-90).

October 27, 1922, Mr. Doheny called at the office of Admiral Robison of the Navy Department at Washington and there was discussed the California oil situation, the effect on the value of the Government's oil resulting from the flush production and the great decrease in price which, to that time, had cut the value of the Navy's royalty oil in half. It was noted that the price of fuel oil, such as used by the Navy, had been reduced very little; a decrease in the output of the naval reserves was observed, as was the fact that the decrease in the price of crude oil meant that it would take the Navy twice as long to pay for the Pearl Harbor development as would have been the case on the basis of the price of that commodity at the time the contract of April 25th was made. Mr. Doheny expressed to Admiral Robison the belief that the cut in the price of crude oil had already been excessive and that it should in no case have exceeded the cost of storage. He stated that he was prepared to furnish 1,000,000 barrels of fuel oil in storage at San Francisco, to be available for Navy use on demand, maintenance cost, cost of delivery to tankers, and cost of transportation from the reserves to tidewater to be paid by his company; that, further, in case the Navy desired to use fuel oil to a greater extent than would be paid for by accrued royalties, he would guarantee the delivery of such oils at 10 per cent below the market price. In return for these concessions, Mr. Doheny informed Admiral Robison he desired a lease upon certain areas of Naval Reserve No. 1 not yet developed, those areas not to include that portion of the reserve that it would be profitable to leave in the ground. At the time Mr. Doheny contemplated the erection of a refinery and the construction of pipe-

lines from the naval reserve to the refinery and stated that in order that this could be done safely an assured supply of crude oil was required. He expressed the opinion that the mere announcement of the erection of a refinery, and of the entering of his company into the market for crude oil, would increase the price of such so that the ratio between it and the price of refined products would change to the advantage of himself and the Government. Admiral Robison stated to Mr. Doheny that the Government would be unable to purchase over any period of time naval requirements of oil, but that there was nothing to prevent its acquiring the right to obtain such products as suggested by him at a price of 10 per cent below the market rate; that the general plan for the utilization of the naval reserves involved the transformation of the reserves of crude oil under the ground into definite amounts of fuel oil and other crude oil products located at strategic points for naval use when, as and if required. Admiral Robison suggested that Mr. Doheny's proposition would be of most interest to the Navy if it involved the maximum amount of fuel oil held in storage by defendant companies for the Navy's account, and called attention to various stations on the Atlantic Coast where it was desirable to have fuel oil in storage for the account of the Navy with a guarantee of its continued reservation. In response to this Mr. Doheny indicated the amount of fuel oil he could guarantee to be kept in reserve for naval account in tanks at Atlantic coast points. At the conclusion of the conference Admiral Robison informed Mr. Doheny that he desired further details for consideration which Mr. Doheny stated he could not furnish at the moment but that he would have gotten together the information the Admiral wanted and within a few days would furnish a general memorandum in which would be embodied his suggestions for a proposed contract with the Navy Department.

Immediately at the close of this conference Ad-

miral Robison dictated a memorandum of the substance of what had taken place, and his views on the proposition which he characterized as attractive to the Navy, but did not measure by any means all that the Navy could get; from his view the proposition appeared sound, subject to the condition that the amount of fuel oil in storage by the Transport Company should be made as great as the Navy could possibly secure (R. v. II, 1015-21). Admiral Robison reported to Secretary Denby the whole story of this interview with Mr. Doheny (ib. 1015). The memorandum setting forth what was said at the interview, and Admiral Robison's conclusions and comments thereon, was made a part of the Navy Department's files (ib.).

Nothing was said, in this conversation between Admiral Robison and Mr. Doheny on October 27, 1922, by either with regard to an increase in the Pearl Harbor project; the Pearl Harbor subject was not mentioned at all except in connection with so much thereof as was then under construction under the April 25th contract (R. v. II, 1022).

Under date of November 6, 1922, Mr. Doheny wrote a letter to Admiral Robison enclosing additional memorandum concerning the advantages which were offered to the Government in connection with the acquisition of additional territory for drilling purposes on Naval Reserve No. 1, and expressed the hope that this additional memorandum was of the nature which Admiral Robison required, and the assurance of his companies' desire to aid the Government in every way and to make such changes in the proposition as they might be able to do at the Navy's suggestion (R. v. II, 598).

The memorandum enclosed with the last mentioned communication referred to the situation in California produced by the flooding of the market with oil following the discovery of three oil areas so located as to require rapid and close drilling, resulting in a reduction in oil prices with a consequent loss to the

Government on royalty oil from wells operated by its lessees in California. A remedy was suggested under a plan providing for the construction of storage facilities for from 2,000,000 to 5,000,000 barrels at some California seaport; the construction of a refinery with an initial daily capacity of 10,000 barrels, to be increased to 20,000 when the situation justified, and the construction of pipelines from the naval reserves to the refinery. It was suggested that the storage to be provided under the plan would result in arresting the downward tendency of prices. The memorandum sets forth that this new venture would necessitate the expenditure of approximately \$10,000,000 and could only be undertaken upon assurance of sufficient supply of oil to keep the refinery operating. The naval reserves were referred to as reliable sources of such supply and it was stated that if a contract could be made under which the Government's royalty crude oil could be acquired for a period of ten years after the completion of the April 25th Pearl Harbor contract, that would become a valuable adjunct to the suggested new enterprise. There would further be required, in order to carry on the enterprise, the assurance that certain designated lands in Naval Reserve No. 1 should when leased be leased to the company establishing such an enterprise, the development of such lands to be done when and as rapidly as required by the Government to protect its lands from depletion by drilling on adjoining territory, and the royalty on such lands to be the regulation royalty required by the Government. There were set forth in the memorandum benefits which it was said could be guaranteed to the Government under the suggested plan, including the transportation of Government royalty oil from the reserves to the refinery at San Pedro or San Francisco; the providing to the Government free storage for 1,000,000 barrels of fuel oil adjacent to the refinery at tidewater; the bunkering of Government ships at cost at the docks of the new enterprise without profit; the

giving to the Navy of the privilege of purchasing any additional fuel which it might require, above the amount to which it would be entitled in exchange for royalty crude, at 10 per cent less than the market price at tide-water, as such price was determined by current Navy contracts for fuel oil; the furnishing to the Navy of manufactured products of petroleum, such as gasoline, kerosene, lubricating oil, greases, etc., at 10 per cent below the market prices, as determined by current Navy contracts; and the carrying, subject to the requirements of the Navy, for a period of 15 years, of 3,000,000 barrels of fuel oil at such places along the Atlantic Seaboard as might be desired. Arguments to show the advantage of the plan were set forth and the drainage from the Government reserves referred to (R. v. II, 598-607). There were appended to the foregoing memorandum seven sheets, each listing a certain number of sections in reserve No. 1 ranging from a minimum of 4 to a maximum of 19, representing different ideas as to the number of sections to be leased in the event of action by the Government on the proposition contained in the memorandum. The sheet listing four sections as the number to be leased indicated that if that number only were leased the lessee would not undertake the construction of the pipelines. The handwriting appearing upon these sheets was that of J. C. Anderson, president of the Petroleum Company (R. v. II, 607-8).

Copy of the foregoing memorandum of November 6th was transmitted to the Secretary of the Interior, and it reached Dr. Bain through the Secretary's office. In connection with the subject matter of that memorandum Secretary Fall instructed Dr. Bain to do nothing except as the Navy wanted it done, saying that it was Navy business (R. v. II, 790). The Interior Department did not take the matter up with the Navy, but waited for the Navy, and Admiral Robison of the Navy Department almost immediately took up the subject with the Director of the Bureau of Mines. Admiral

Robison told Dr. Bain that the subject was being discussed by the officials of the Navy and that he thought that the Navy would decide to go ahead. This was prior to November 29, 1922, and at that time nothing was said about Pearl Harbor (R. v. II, 790-1).

About the middle of November, 1922, Mr. J. J. Cotter, Vice-President of the Transport Company, and Mr. J. C. Anderson, President of the Petroleum Company, called at the office of Admiral Robison and brought up the subject of Mr. Doheny's proposition of November 6th. At this time Admiral Robison informed Messrs. Cotter and Anderson of the Navy's need for about 2,500,000 barrels more of oil in Pearl Harbor and stated that he wanted everything that Mr. Doheny offered and this additional 2,500,000 barrels, together with storage facilities therefor (R. v. II, 1022-3). In this conversation the leasing of all of Naval Reserve No. 1 was not discussed, nor had anything been said about any such action during the conversation between Admiral Robison and Mr. Doheny in the former's office on October 27th. Prior to the negotiations hereinafter narrated neither Mr. Doheny nor anybody representing the defendant companies made any application for a lease of all of that reserve (ib. 1023).

NAVY DECISION TO CONTRACT FOR INCREASED FUEL OIL AND OTHER PETROLEUM PRODUCTS IN STORAGE AT PEARL HARBOR AND TO LEASE ADDITIONAL AREAS IN NAVAL RESERVE NO. 1.

November 29, 1922, Secretary Denby addressed to the Secretary of the Interior a letter, hereinbefore briefly referred to, stating that the Navy's need for storage for fuel oil and other petroleum products at Pearl Harbor involved a considerable extension of filled storage beyond that existing or provided for in the contract of April 25, 1922; that it had been suggested that if the preferential privilege for leasing areas in the reserve then possessed by the Transport Company under the terms of the above mentioned con-

tract should be immediately put into operation over such areas of that reserve as would naturally be opened up at once, and as would not be part of a natural reserve which could be maintained more or less indefinitely, the Transport Company would be glad to undertake the construction and filling of the additional storage required at Pearl Harbor; the quantity of additional fuel oil and other petroleum products required at Pearl Harbor was listed; it was stated that the Navy Department desired, in addition, storage for fuel oil and other petroleum products along the Atlantic and Pacific Coasts and at the Panama Canal and that it would be a national advantage to have considerable commercially owned fuel oil storage at Honolulu; that it had been suggested that the contract with the Transport Company could be revised so as to provide for free transportation of Navy royalty oil from the sources of supply to a refinery at deep water, and it was stated that that free transportation would, of course, be a considerable Navy asset and that it would further be an asset for the Navy to have stored for any considerable period, such as fifteen years, any large quantity of privately owned fuel oil to be subject to the requirements of the Navy. The letter continued that it appeared to the Navy Department that the royalty oil accruing to the Navy from additional leases in Reserve No. 1 should be a sufficiently great proportion to the total production as in itself would justify the granting of the leases. The Secretary of the Navy had theretofore requested the Secretary of the Interior to act as agent of the Navy Department in this matter, and now requested the latter to take steps to modify the existing contract with the Transport Company for the production and filling of fuel oil storage at Pearl Harbor (or enter into a new contract, if such was found more desirable) to the end that as much fuel oil in storage as practicable might be ordered for the benefit of the Navy. Secretary Denby concluded that he had instructed Admiral Robison to confer with the

Secretary of the Interior, as his (Denby's) direct representative, and that the Secretary of the Navy would be pleased directly, or through Admiral Robison, to furnish the Secretary of the Interior any information or assistance that might be required, if the latter saw fit to undertake the accomplishment of the request. It was requested that the amounts of storage projected be treated as confidential (R. v. II, 616-18). The circumstances attending the writing of this letter have been hereinbefore set forth (R. v. II, 1023-4). The Secretary of the Navy's letter of November 29, 1922, was referred, through the office of the Secretary of the Interior, to the Director of the Bureau of Mines, without any instructions from Secretary Fall on the subject (R. v. II, 791).

NEGOTIATIONS FOR THE CONTRACT OF DECEMBER 11, 1922,
AND THE LEASE BEARING THE SAME DATE.

These are the third and fourth documents the validity of which is in issue in this suit. The negotiations for both were carried on simultaneously and will therefore be here treated under one head. The contract was made with the Transport Company and the lease with the Petroleum Company and under appropriate heads hereinafter the operations under each will be separately stated.

Following the transmittal of the Secretary of the Navy's letter of November 29th Admiral Robison telephoned the New York office of the Transport Company and asked that some one be sent down to Washington. Conferences were promptly begun, some of which took place in Admiral Robison's office and most of which took place in the office of the Director of the Bureau of Mines. These conferences were participated in by Admiral Robison, Dr. Bain and Mr. Ambrose for the Government, and Mr. Cotter and Mr. Anderson for the defendant companies, Mr. Doheny being present at the first and last of the meetings. Neither Secretary Denby nor Secretary Fall was personally present at

any of the conferences. Admiral Robison kept Secretary Denby informed and also had one or two or perhaps more conferences with Secretary Fall. Dr. Bain saw Secretary Fall, as hereinafter stated (R. v. III, 1025; v. II, 791). At the first meeting, which Mr. Doheny attended, there was a general discussion, following which he left, and through a series of days there were discussions participated in mainly by Mr. Anderson and Mr. Cotter, on the one side, and Mr. Ambrose, Dr. Bain, and Admiral Robison on the other (R. v. II, 792). Admiral Robison conferred, during this period, with Messrs. Bain and Ambrose when representatives of defendants were not present and throughout the officials of the Bureau of Mines supported the position taken by Admiral Robison as they were acting in the matter for the Navy (ib. 793). During the early part of these negotiations the leasing of the entire unleased portion of Naval Reserve No. 1 came up and Admiral Robison was the first one who mentioned the matter of making a lease to all of that reserve (R. v. II, 1023; v. III, 1025-6). He stated to the Bureau of Mines officials that the Navy would lease the whole reserve if they got enough for it; that he was anxious to have drilling restricted so far as could be done, compatible with making the kind of a bargain that the Navy wanted, and the matter as to what part of the reserve should be subject to restrictions came up later (R. v. II, 791). Admiral Robison told Dr. Bain and Mr. Cotter that he thought the Navy could afford to lease the whole reserve if by so doing the benefits the Navy would get out of the deal would be increased (R. v. III, 1026). The conferences were a continuous set of negotiations during which Admiral Robison was endeavoring to get for the benefit of the Navy as many of the advantages, indicated in his memorandum of October 27th (R. v. II, 1015-21), as he could, and was trying to accomplish that end by identifying the interests of the companies with those of the Government (R. v. III, 1026).

In the conferences there were two subjects that were discussed most. One of them was the additional facilities at Pearl Harbor, to be obtained under the contract, and the other was the royalty to be provided for in the lease (ib. 1028). Representations were made by the respective parties as regards the advantages each would obtain under the contract and lease which were the subject of the negotiations (R. v. III, 1028-30; v. II, 792). There was finally reached an agreement on every point except the royalties to be allowed the Government under the proposed lease (R. v. II, 794). There had been heated discussions as regards the number of sections in the reserve which, if leased, should be open to immediate drilling, and the number of sections which should be included in the western half of the reserve on which drilling was not to be permitted until and unless ordered by the Government (R. v. II, 870-1). Mr. Anderson of the Petroleum Company insisted that the royalties to be rendered to the Government under the proposed lease should range from 12½ to 20 per cent, a range referred to throughout the record as Interior Department's regulation royalties (R. v. III, 1030-37). Admiral Robison insisted on a schedule of royalties beginning with one-seventh instead of one-eighth and running up to a maximum of 30 per cent (R. v. III, 1036). Mr. Anderson refused to accept the Admiral's royalties or anything except what he proposed (R. v. II, 794). The negotiators split on this point (R. v. II, 871).

Dr. Bain and Mr. Ambrose prepared memorandum of the schedules of royalties the Government was receiving under various leases theretofore made (R. v. II, 783-94) and Dr. Bain took this memorandum to Secretary Fall and talked over the subject with him and the Secretary and the Director worked out an intermediate or compromise set of royalties as being a fair basis and one which perhaps could be agreed upon (R. v. II, 794; 871). Secretary Fall instructed Dr. Bain to take up this intermediate set of royalties with Ad-

miral Robison and also to give a copy of it to Mr. Cotter to see if Mr. Doheny would take it up. The Secretary pointed out that negotiations would probably fail because Mr. Doheny could hardly overrule his own men. Dr. Bain gave a copy of the suggested schedule to Mr. Cotter and told him to take it up with Mr. Doheny while he, Dr. Bain, took it up with Admiral Robison. At that time the conferences had broken up. Admiral Robison after studying this schedule talked to Dr. Bain and Mr. Ambrose and then went up and talked it over with Secretary Fall (R. v. II, 794-5). Admiral Robison at this time prepared a memorandum, dated December 8, 1922, for his own use in presenting the case to the Secretary of the Navy (R. v. III, 1032). He took up the subject with Secretary Denby, went over his memorandum with the Secretary with the idea of obtaining from the Secretary authority to come to an agreement. After they conferred Secretary Denby's final instructions to Admiral Robison were to go ahead and do the best he could (ib. 1032). In his memorandum of December 8, 1922, Admiral Robison set down arguments minimizing the risk which the Transport Company was taking in connection with the project for increased oil in storage at Pearl Harbor, showing the value, according to a quoted statement made by Mr. Doheny, of the proposed lease if the same was based upon payment of standard royalties (R. v. III, 1033), by which was meant the Interior Department's regulation royalties of $12\frac{1}{2}$ to 20 per cent (ib. 1037), and concluding that on the basis of standard royalties the Government would not receive a sufficient return under the lease and that therefore the royalties to be paid by the lessee should somewhat exceed the regulation royalties. Admiral Robison figured that the average return from regulation royalties had amounted to $14\frac{1}{2}$ per cent and that, if his analysis was correct, the Government's interest could be fully protected by securing a minimum royalty of one-seventh

instead of the regulation one-eighth and by increasing the maximum royalties for the larger average wells to 30 per cent as had theretofore been recommended by the Secretary of the Interior (ib. 1033-36).

Following the sending, under Secretary Fall's instructions, by Dr. Bain through Mr. Cotter to Mr. Doheny of proposed schedule of royalties (ib. 1030), Mr. Doheny under date of December 8, 1922, wrote the Secretary of the Interior to the effect that very careful consideration had been given to the difference between the royalty schedule offered by the Government for insertion in the lease in connection with the proposed modification of the Pearl Harbor contract and the schedule which his companies had proposed to request of the Government; that realizing that the value of the contract would depend largely upon better prevailing prices, it had been concluded that the possible appreciation in prices might be made to absorb the difference between the two schedules of royalties, and the companies had decided to accept the Government's schedule as offered (R. v. II, 619). Immediately upon receipt of this letter Secretary Fall referred it to Admiral Robison under cover of a letter dated December 8th in which he reviewed briefly the differences he understood existed as regards royalties and stated that he presumed Mr. Doheny, by the reference in his letter to royalties which the Government had offered, referred to those which had been tentatively suggested by the writer as affording a ground for discussion and which are set forth in the letter to the admiral. Secretary Fall's letter stated that unless these royalties were entirely satisfactory to Admiral Robison, and unless the draft of the contract was in other respects satisfactory, he would immediately notify Mr. Doheny of the admiral's conclusion, adding that he would not agree to or sign any contract which was not in every particular satisfactory to Admiral Robison as the latter had been designated by the Sec-

retary of the Navy to represent him personally in the matter (R. v. II, 796-8).

Admiral Robison having been over his memorandum (R. v. III, 1033-36) and having been authorized to go ahead and do the best he could (ib. 1032), called on Secretary Fall, evidently before the receipt of this last-mentioned letter, and told the Secretary that he wanted a one-seventh royalty for a minimum and Mr. Fall told him to go ahead and see if he could get it as he, Fall, could not (R. v. III, 1031).

Admiral Robison then went to the Bureau of Mines and stated he wanted to do some more trading, that he still thought he could get a higher royalty (R. v. II, 795); he entered a conference with Messrs. Doheny, Anderson and Cotter and brought out all the arguments he could in favor of increasing the royalty, and set forth his idea of the enormous advantage that it would be to a concern to have such an assured supply of oil; he represented the advantages to the company as big and those to the Navy as small and he urged that the Government get greater royalties than those set forth in the so-called compromise schedule. He had previously been assured by Messrs. Bain and Ambrose that this schedule was materially better than the Government could otherwise obtain and was an excellent bargain for it, quite irrespective of the advantages represented by the obtainment of 4,000,000 barrels of oil in storage (R. v. III, 1031). Mr. Doheny was present with Mr. Anderson and Mr. Cotter at this conference, and said he had gone as far as he thought he could (R. v. II, 795; v. III, 1032). The discussion became heated. Something said caused Mr. Doheny to threaten to terminate the negotiations. After giving thought to the representations made, and further talk on the subject, Admiral Robison and Mr. Doheny reached an agreement to enter into a lease providing for royalties according to the schedule included in the lease of December 11, 1922 (R. v. II, 795; v. III, 1032). After the last-

mentioned conference, which was held in the office of Dr. Bain on the afternoon of December 8, 1922, Admiral Robison reported to Secretary Denby on the subject that he had to accept returns that began with 12½ per cent and went up to 35 per cent. Secretary Denby asked the admiral if it was the best he could get and upon learning from the latter that it was and that he had tried hard, the Secretary approved his action (R. v. III, 1039).

Following the conference at which the agreement was reached Admiral Robison replied to Secretary Fall's letter of December 8th, by letter dated December 9th, stating that in view of the records of production in Reserve No. 1 it appeared that the royalties given in Secretary Fall's letter were materially in excess of the standard royalty, and in view further of the great value to the Government of the immediate construction of additional naval facilities for the storage of oil and of the assumption on the part of the contractor of the entire risk of repayment in royalty oil, it appeared desirable that the Government acquiesce in those royalties. The writer added that he was going over the details of the proposed contract and would inform the Secretary further as soon as he had been advised by the legal authorities of the Navy Department (R. v. II, 798-99).

EXECUTION OF CONTRACT AND LEASE OF DECEMBER 11, 1922.

Messrs. Bain and Ambrose and Messrs. Anderson and Cotter worked on the drafting of the contract and lease of December 11, 1922 (R. v. II, 799). When it had been drafted Admiral Robison went over it in detail and at length with the Secretary of the Navy and passed it over to the Judge Advocate General for study and any necessary revision. There were several changes suggested by the Judge Advocate General in the verbiage of the contract that appeared to that office would better safeguard the naval interests. Ad-

miral Robison talked with Mr. Neagle, the Solicitor of the Navy, as well as to the Judge Advocate General himself, regarding that draft (R. v. III, 1039). The Solicitor and Judge Advocate General approved the draft of the contract, which on or about December 9th had been referred to the legal advisers of the Secretary of the Navy by Admiral Robison, acting by direction of Secretary Denby (R. v. II, 706-7). Thereupon Admiral Robison transmitted the draft to the Secretary of the Interior, under cover of letter dated December 11, with the statement that it had been carefully reviewed by himself and the Judge Advocate General of the Navy and with the exception of the changes noted thereon was entirely satisfactory to the Navy Department and believed to be an advantageous contract for the Government to enter upon. The Admiral stated that he assumed that the Interior Department would prepare the final contract for signature and unless otherwise directed he would act accordingly (R. v. II, 707).

After receipt of this communication by the Bureau of Mines the drafts of the contract and lease were revised, where necessary, a few pages being recopied, and they were executed in the office of the Director of the Bureau of Mines on behalf of the defendant company by Mr. E. L. Doheny. Dr. Bain then presented these documents to Secretary Fall, informing the Secretary that they represented the contracts that had been worked up. Secretary Fall had not seen the draft of contract and lease prior to that time and when they were presented to him he read them carefully, asked if they were all right, and was informed by Dr. Bain that they were. There were present at the time, in addition to the Secretary, Messrs. Doheny, Cotter and Bain (R. v. II, 801).

From the Interior Department Robison took these papers to Secretary Denby's office, being accompanied by Messrs. Doheny and Cotter. When

the contract and lease were presented to Secretary Denby for signature he inquired of Admiral Robison whether they included the changes which the Secretary had indicated and the admiral showed him that they had been included in the final draft as directed. The Secretary then inquired if there was anything else in the contract except as agreed and Admiral Robison assured him that it was identical with what he had been over with the Admiral in detail. The Secretary of the Navy thereupon executed the contract and lease.

Prior to this time Mr. Denby and Mr. Doheny had never met and they were introduced by Admiral Robison, who also presented Mr. Cotter to Secretary Denby. Mr. Doheny and Secretary Denby had a brief conversation in which the Secretary said, in substance, "You have got a big job to do and you have got a fine piece of property," and Mr. Doheny replied, "We have got what I hope will be a fine piece of property, but we certainly have got a big job to do" (R. v. III, 1040-1).

There was attached to and made part of the December 11th contract the letter from the Secretary of the Navy to the Secretary of the Interior, dated November 29, 1922, advising of the Navy's decision to contract for the increased fuel oil in storage and to lease additional lands in Reserve No. 1 (R. v. I, 41-50).

OPERATIONS UNDER AND COMPLETION OF PROJECT PROVIDED
FOR BY THE TERMS OF CONTRACTS OF APRIL 25 AND
DECEMBER 11, 1922.

The carrying on of the work under these contracts was turned over to the Bureau of Yards and Docks, the United States Navy. Admiral Robison functioned in connection with having the tanks filled with the fuel oil (R. v. II, 1010). The construction work was done by the White Engineering Company for the Transport Company. All the plans and specifications were prepared in the Bureau of Yards and Docks (R. v. II, 541; 561; 573-4). The April 25th and December 11th

contracts were designated as Bureau of Yards and Docks Serial No. 4650 and No. 4800, respectively, by which they were identified in correspondence and other papers relating thereto (ib. 561). As the April 25th contract was actually opened there was allowed no profit to the principal contractor, the Transport Company (ib. 570). The December 11th contract was a cost contract under which the Transport Company has done the work without any profit to it (ib. 574). Bids for all sub-contracts were submitted to the Bureau of Yards and Docks before sub-contracts were entered into (ib. 582).

Admiral Gregory had charge of the operations under both contracts. Admiral Simpson, and his successor Admiral McDonald, commandants of the naval station at Pearl Harbor, were in command of the work, and Commanders Carlson and Brownlow, on duty at the Pearl Harbor Navy Yard as public works officers, were in direct touch with it. The Bureau of Yards and Docks detailed to Pearl Harbor Lieutenant Keating, who had acted as liaison officer between the Navy and the Bureau of Mines during the period when the first set of plans was being prepared and the first contract was being negotiated, and who had prepared an estimate on the cost of the project (R. v. II, 565), to immediate supervision of the work, to see that it was done in accordance with the Navy's plans and specifications. Lieutenant Keating was assisted by naval inspectors. The entire matter was handled in accordance with the Navy Department's usual custom (ib. 570, 571). The April 25th contract was entirely completed three months before this suit was instituted (ib. 575), and at the time of the trial in the District Court the work under the December 11th contract was over 90 per cent complete (ib. 575), and prior to the entry of decree had been entirely completed (R. v. III, 1197). The work progressed in a very satisfactory manner as to time and quality (R. v. II, 575).

No officer or employee of the Interior Department,

as distinguished from officers and employees of the Navy Department, has had anything to do with this work (R. v. II, 571).

In the opinion of the Chief of the Bureau of Yards and Docks the United States has received at least \$1.10 for every \$1.00 expended on this Pearl Harbor work (ib. 570), and he considers the fuel base now there the best the United States has in the entire service, and he does not know of any better in the world (R. v. II, 575).

The Transport Company's books containing the accounts relating to the construction work done and the oil supplied under the April 25th and December 11th contracts have been audited by Government accountants and have been found to have been properly and accurately kept; vouchers showing all expenditures on account of the construction work done at Pearl Harbor and showing the delivery of fuel oil in tanks there under these contracts were all certified by the naval officers on the job and sent to the Bureau of Yards and Docks in Washington, and there certified by Rear Admiral L. E. Gregory, Chief of that Bureau, and thence sent to the officers of the Transport Company (R. v. III, 1197-8). The cost of the work, of the fuel oil, and of crude oil delivered by the Government to the Transport Company in payment therefor, was agreed to by the parties in the District Court (ib. 1198).

The naval officers in charge of the work at Pearl Harbor and the Chief of the Bureau of Yards and Docks in Washington have certified to the final completion, to the satisfaction of the Navy Department, of the construction work under contracts of April 25 and December 11, 1922, and the delivery of all fuel oil, of naval specification quality, required under the April 25th contract (R. v. III, 1196-1201).

By the terms of the December 11th contract the Transport Company was obligated to deliver the 1,500,000 barrels of oil called for by the April 25th contract at a time earlier than required by the last mentioned document. The April 25th contract provided that

the Transport Company should be allowed credit for that oil on the basis of the market price thereof, plus the cost of transportation at prevailing freight rates, from Pacific Coast to Pearl Harbor. In January, 1923, this delivery was called for. The market price of fuel oil at that time was \$1.00 per barrel at tidewater, California. The Transport Company was able to procure the oil at 90 cents a barrel, 10 cents less than the then prevailing price, and, upon investigation, the Bureau of Supplies and Accounts of the Navy found that 90 cents was a lower price than the Bureau could obtain fuel oil for. The Transport Company agreed to give the Government the benefit of this saving of 10 cents a barrel and by an exchange of correspondence the company was directed, and agreed, to supply, and deliver into the tanks at Pearl Harbor, the 1,500,000 barrels of fuel oil on the basis of 90 cents per barrel, plus 46 2-3 cents freight, the latter being slightly below the then prevailing freight rate, or a total of \$1.36 2-3 a barrel, in exchange for which the Transport Company was to receive from the Government an equivalent number of barrels of crude oil (R. v. III, 1046; v. II, 808-821). In connection with this arrangement the Transport Company further agreed that should there be a decline in price of fuel oil during the period of delivery it would, under its agreement with the Associated Oil Company which was supplying it with fuel oil, receive a proportionate decrease in the price to be paid by it to the Associated Company and would give the benefit of any such decrease to the Government (R. v. II, 821).

The oil delivered in the tanks at Pearl Harbor by the Transport Company (the actual quantity being 1,453,274.94 barrels, R. v. III, 1201) was tested and passed by Navy inspectors (ib. 1046).

OPERATIONS, OIL PRODUCED AND EXPENDITURES MADE, UNDER
LEASES OF JUNE 5 AND DECEMBER 11, 1922.

These leases, executed under the authority of the Act of June 4, 1920 (R. v. I, 50), are separate documents from the contracts. The lands in Naval Reserve No. 1 covered by these leases are graphically shown by Exhibit XXX (R. v. III, 1210). The sections shaded on this exhibit are those which, while leased, are reserved from drilling until the Government consents to drilling thereon (R. v. I, 57). Plaintiff and defendants are in agreement as to the amount expended by the Petroleum Company in drilling, putting on production, and maintaining and operating wells drilled under the leases, and in making other useful improvements on the property covered thereby (R. v. III, 1199-1200). The Petroleum Company's books containing the accounts of these operations were audited by certified public accountants employed by the Government for the purpose (ib. 1197). All expenditures made were in compliance with and performance of the terms of the leases, and were properly accounted for and vouchered, and the work was done under proper supervision, in an economic and efficient manner, and the improvements were all of the full value paid therefor to the lands covered by the leases (ib. 1200-1; 1428).

The Government received under these leases an average royalty of 28 per cent. Under leases in Naval Reserve No. 2 the average royalty received by the Government is 18 per cent (R. v. II, 829).

INFORMATION TRANSMITTED TO CONGRESS WITH MESSAGE
OF PRESIDENT STATING APPROVAL.

On April 29, 1922, the Senate adopted a resolution directing the Secretary of the Interior to furnish the Senate with correspondence, papers, files, executive orders, and all contracts for drilling oil wells on naval oil reserves of the United States, with all detailed information relating thereto (Senate Resolution No. 282,

67th Congress, 2nd Session). On June 3, 1922, the data requested was transmitted to the Senate and included in that data so transmitted was a copy of the contract between the United States and the Transport Company of April 25, 1922, omitting only detailed specifications and blueprints (Senate Document No. 210, 67th Congress, 2d Session, pp. 2, 11). A report from the Secretary of the Interior to the President, dated June 3, 1922, set forth in considerable detail the plan under which crude oil was being, and would be, exchanged for fuel oil and storage facilities therefor at strategic points designated by the Navy (ib. 10-11; 13). In a message of the President of the United States to the President of the Senate dated June 7, 1922, in which the aforementioned Senate resolution was referred to, the President transmitted to the Senate the above mentioned report which he had received from the Secretary of the Interior, and said:

"I think it is only fair to say in this connection that the policy which has been adopted by the Secretary of the Navy and the Secretary of the Interior in dealing with these matters was submitted to me prior to the adoption thereof, and the policy decided upon and the subsequent acts have at all times had my entire approval." (Senate Document 210, 67th Congress, 2d Session).

By Senate Resolution No. 305 of that session 4,000 copies of this message of the President, with the accompanying communication from the Secretary of the Interior, were ordered printed.

No other action was taken by the Congress until there was passed Joint Resolution, approved February 8, 1924, directing the institution of this suit.

THE CIRCUMSTANCES IN WHICH WORK UNDER THE CONTRACTS OF APRIL 25 AND DECEMBER 11, 1922, WERE CONTINUED AND COMPLETED.

In the early part of 1924 conferences were held in the Navy Department at which were discussed the sub-

ject of the ways and means of completing the Pearl Harbor project. The Acting Secretary of the Navy then said it was vitally important that the thing be completed, and that the work in progress be prosecuted immediately to completion (R. v. III, 1048).

Under date of March 8, 1924, Mr. E. L. Doheny addressed a letter to the President of the United States in which, after referring to existing conditions and his company's primary reason for entering into the Pearl Harbor contracts, he stated that approximately \$7,500,000 had already been expended under those contracts and that the completion of the construction would cost \$2,000,000 more. Mr. Doheny informed the President that unless otherwise directed by the President of the United States or by the Navy, the Transport Company would complete the work, and that it had undertaken to do this upon Mr. Doheny's personal guarantee that it would be saved from any loss due to the continuance of the work (R. v. III, 1159-61).

Upon the trial in the District Court the defendants by their counsel in open court tendered themselves ready, willing and able to perform all the obligations imposed upon them by the terms of the contracts and leases in this suit (R. v. III, 1161).

As hereinbefore stated, the work provided for by both of the contracts has been fully completed, and the 1,500,000 barrels of fuel oil called for by the first of the contracts has been delivered into the tanks at the Pearl Harbor naval station.

THE EVIDENCE PRESENTED TO DEFEAT ALL OF THE CONTRACTS AND LEASES IN SUIT.

The United States in its amended bill of complaint charged that the contracts and leases in issue in this case were entered into as a result of a conspiracy between Albert B. Fall and Edward L. Doheny, that each and every act done in the negotiations and making of the contracts was "pursuant to said conspiracy," and that it was agreed, as part of said conspiracy, that in

consideration of the rights created in the defendants, under the terms of said writings, Fall was to receive from Doheny, and he did receive, upon said consideration, on Nov. 30, 1921, the sum of \$100,000 (R. v. I, 10-13).

It was shown by evidence received on the trial (over the objections and under exceptions duly noted by defendants) that on November 30, 1921, Mr. E. L. Doheny, Jr., drew from his personal bank account, kept at the banking house of Blair & Co., New York, the sum of \$100,000 in currency; that at that time the balance in the personal account of Mr. Doheny, Sr., at said bank amounted to \$8,633.72 and the balance of Mr. Doheny, Jr., amounted to \$111,011.65; that on December 6, 1921, there was credited to the Doheny, Jr., account the sum of \$40,000, the proceeds of check of E. L. Doheny on Security Trust and Savings Bank, Los Angeles, California; that on January 23, 1922, there was credited to the account of Doheny, Jr., the sum of \$116,002.29, proceeds of two checks of E. L. Doheny on the said Security Trust and Savings Bank, one for \$60,000 and one for \$56,002.29 (R. v. I, 165-9).

There was given in evidence a promissory note dated Washington, November 30, 1921, by the terms of which the maker promised on demand to pay to the order of E. L. Doheny \$100,000 at New York or Los Angeles, with interest. This note was identified as being entirely in the handwriting of Albert B. Fall, and it was shown that the signature had been torn from the body of the note (R. v. I, 173).

The testimony of the wife of E. L. Doheny, Sr., showed that at the apartment occupied by Mr. and Mrs. Doheny in New York Mr. Doheny had shown his wife the above mentioned promissory note, which at that time had on it the signature of Albert B. Fall. At that time Mr. and Mrs. Doheny were about to leave New York for Los Angeles to spend the Christmas holidays at home. Mr. Doheny said to his wife that he had loaned his friend Mr. Fall \$100,-

000 and had the latter's promissory note for it; that the loan was made to help Mr. Fall out of financial difficulty; that if on their trip across the country they were overtaken by disaster resulting in both being killed, it would be the duty of Mr. Doheny's executors to enforce the note according to its terms; that as Mr. Fall had borrowed the money to purchase a ranch, if the note was enforced immediately against him he would be in a worse position financially than he was before the note was made; that therefore Mr. Doheny would put the note in two parts, taking off the signature and placing it in the custody of his wife, and keeping the body of the paper in his own possession, which he did, saying, at the time, that in the event of their deaths their son would understand this act. Mr. Doheny enjoined his wife to keep the signature carefully so that the note could be put together again when Mr. Fall was ready to pay it; that he wanted her to take care of it until such time as he called for it to put the two parts together. Mrs. Doheny put the part of the note on which the signature appeared, first in a jewelry box, and, after the arrival of her husband and herself in Los Angeles, in their joint safe deposit box in that city. In January, 1924, her husband had asked her to get the signature for him and at that time she was uncertain as to just where she had placed it and did not find it in a hurried examination of her safe deposit box. Subsequently, on April 30, 1924, in the presence of Judge Charles Wellborn, one of counsel in the case, Mrs. Doheny found the signature in a small envelope in the box where she had placed it in December, 1921 (R. v. I, 181-5).

Plaintiff offered evidence to show that on December 5, 1921, Albert B. Fall entered into a contract for the purchase of property known as the Harris Ranch, located at Three Rivers, N. M., adjoining a ranch theretofore owned by Mr. Fall; that the contract provided for the sale of land and cattle for a total price of \$91,500 on account of which there was at that time paid

the sum of \$10,000 in currency. Testimony was given of subsequent payments by checks on account of the aforesaid purchase price (ib. 174-180).

The Government called to the stand Messrs. E. L. Doheny, Sr., and Jr., and upon the District Court being informed by Government counsel that there were pending in the Supreme Court of the District of Columbia indictments charging the Messrs. Doheny with conspiracy and bribery in connection with the transaction about which the Government desired to interrogate them as witnesses, the Court sustained their constitutional immunity and excused them from testifying (ib. 185). Mr. Doheny, Sr., testified that he was at the time chairman of the Board of Directors of the Transport Company and had in November and December, 1921, been its president; that he was, and for many years had been, a stockholder in the company (ib. 187).

By answer of the defendant companies it was admitted that Mr. Doheny was, on July 24, 1922, president of each of the defendants, having on that date retired as president of the Petroleum Company, since which time he had been chairman of its Board of Directors; that he had been president of the Transport Company up to December 7, 1923, at which time he retired as president and was elected chairman of the Board of Directors (ib. 84).

It was stipulated on the trial that all of the shares of the stock of the Petroleum Company at the time of the occurrences referred to in the bill of complaint were owned by the Transport Company; that the capital stock of the Transport Company was divided into two classes, known as A and B, of which the former was the voting stock; that the total stock of the Transport Company amounted to 2,726,630 shares, of which 1,100,556 shares were Class A and 1,626,074 were Class B; that there were a total of 11,850 separate shareholders owning these two classes of stock; that E. L. Doheny was the owner of

2,417 shares of A stock; his wife owned 837 shares and his son and son's wife a total of 785 shares of A stock and 3,755 shares of B; that the Petroleum Securities Company, a California corporation, owned 525,480 shares of Transport Company A stock and that the outstanding stock of the Petroleum Securities Company was owned, one-third each by E. L. Doheny, Sr., and his wife, and one-sixth each by E. L. Doheny, Jr., and the latter's wife.

Plaintiff offered voluntary statements made in January and February, 1924, by Mr. Doheny before the Committee on Public Lands and Surveys of the United States Senate, conducting hearings on the subject of leases upon naval reserves (R. v. I, 187-196; 196-294). Testifying before the Senate Committee, Mr. Doheny stated that on November 30, 1921, he loaned Mr. Fall \$100,000 upon his promissory note to enable him to purchase a ranch in New Mexico; the sum was loaned to Mr. Fall by Mr. Doheny personally with his own money, which did not belong in whole or in part to any oil company with which he was or had been connected; in connection with the loan there was no discussion between Messrs. Fall and Doheny as to any contract whatever; the loan had no relation to any of the subsequent transactions; the transactions themselves, in the order in which they occurred, disposed of any contention that they were influenced by his making a personal loan to a life-long friend; the reason for his making, and Mr. Fall's accepting, the loan was that they had been friends for more than thirty years; Mr. Fall had invested his savings for those years in his home ranch in New Mexico, which Mr. Doheny understood was all that remained to him after the failure of mining investments in Mexico and nine years of public service in Washington during which he could not properly attend to the management of his ranch; the death of Mr. Fall's son had deprived him of the one who had been in charge of the management of the ranch; in frequent talks that

occurred in the fall of 1921 between Messrs. Fall and Doheny it was clear that the acquisition of a neighboring property controlling the water that flowed through Mr. Fall's home ranch was a hope of his amounting to an obsession; the joining of the two ranches and the control of the water from the ranch he wished to acquire, to supplement the water on his own land in order to make a good cattle ranch, would make a complete ranch for Mr. Fall's purposes; funds could not be realized on his once valuable Mexican mine holdings; Mr. Doheny and Mr. Fall had been old-time friends; they had both worked in the same mining district in New Mexico in 1885; they were bound together by the ties that bind men who have lived under trying circumstances and conditions; they had studied law at the same time; they had practiced in the same district; Mr. Doheny had watched Mr. Fall's career as district attorney, judge, United States senator, and Secretary of the Interior; he was very much interested in him on account of their old association; Mr. Doheny had followed prospecting, had been fortunate, and had accumulated a large amount of money; Mr. Fall had been unfortunate in his investments, but had a home ranch and entertained the hope of acquiring the adjoining ranch; Mr. Doheny was frequently in Mr. Fall's apartments in Washington and they were always talking about the old-time days, and talked over these things; Mr. Fall had been depending upon raising the money to buy the ranch adjoining his by getting a Mr. McLean to buy an interest in it or by a loan from Mr. McLean or an old partner of Mr. Fall's named McKinney. In one of their talks Mr. Doheny, being of an impulsive nature, told Mr. Fall that he would be willing to make him the loan, that whenever the latter needed the money to pay for that ranch the former would lend it to him. Mr. Fall spoke at that time about possibly borrowing the money from Mr. McLean and he said something about giving the ranch as security

and Mr. Doheny stated that he would make the loan on Mr. Fall's note, that the latter need not give the ranch as security. Later, in the autumn of 1921, by telephone from Washington to New York, Mr. Fall told Mr. Doheny that the purchase had become possible by reason of the willingness of the then owners of the Harris Ranch to sell and that the time had arrived when he was ready to take advantage of Mr. Doheny's offer to make the loan. Thereupon Mr. Doheny had his son cash a check on the latter's account with Blair & Co.'s bank in New York for \$100,000, take that sum in currency to Washington, and deliver it to Mr. Fall. Mr. Doheny does not remember whether Mr. Fall asked that the amount of the loan be sent him in currency or whether he adopted that form at his own election; it was not unusual for him to have large transactions in which currency was used; Mr. Doheny's son obtained from Mr. Fall the latter's note for \$100,000 and delivered it to his father; the loan was a bona fide one for the purpose of accommodating an old friend on his note, which the lender would insist on the repayment of, if the borrower's health remained good. Prior to the time the loan was made Mr. Fall had often spoken of resigning as Secretary of the Interior before his term was out; he said he did not intend to remain in that office very long.

Mr. Doheny has made many loans and this loan to Mr. Fall was not an extraordinary thing to him; there is an army of old prospectors, less fortunate than himself, to whom he has made loans only because of old friendship.

Mr. Doheny expected that probably after Mr. Fall retired as Secretary of the Interior, if Mr. Fall did not sell or turn over the land (referring to his New Mexico ranch property), later on Mr. Doheny might employ him in connection with affairs in Mexico, with which Mr. Fall was very conversant, and the loan would be paid out of the latter's salary, in case Mr. Fall did not find it possible to pay it out of the profits

of his property or was not able to pay it in any other way.

No attorney or officer of the defendant company had any knowledge of this loan transaction, that being an entirely private matter involving in no way the company's funds.

(R. v. I, 198-200; 201; 209; 210; 211; 217; 221; 222; 226; 245; 249; 250; 255; 267; 268).

Before the Senate Committee Mr. Doheny testified regarding the separation of the signature from the body of the note, and the purpose thereof, in substance as Mrs. Doheny testified at the trial (R. v. I, 261-3).

In his testimony before the Senate Committee Mr. Doheny, as an offhand estimate, stated that he expected that the profit that would be made out of production of oil from the leased land in Naval Reserve No. 1 and from the piping, storing, refining and marketing of it would amount to \$100,000,000, which he expected would be realized in the course of 30 or 40 years, in doing which it would be probably necessary to invest in the neighborhood of \$100,000,000 to \$150,000,000, the drilling alone of the required number of wells being estimated to cost \$96,000,000, without pipage, storage, refining, and marketing facilities; up to February, 1924, \$32,000,000 had been expended in preparation for the development of the leases (R. v. I, 234; 240-2).

II.

Specifications of Error Intended to Be Urged.

The Circuit Court of Appeals erred—

1. In holding that the Act of June 4, 1920, did not authorize the contracts between the United States and the Transport Company dated April 25 and December 11, 1922.

2. In holding that the Act of June 4, 1920, did not authorize the leases of lands in Naval Petroleum Reserve No. 1 between the United States and the Petroleum Company dated June 5 and December 11, 1922.

3. In failing to hold that the Secretary of the Navy

under the authority to take possession of all properties in the naval petroleum reserves of the Government and to conserve, use, develop and operate the same, in his discretion, by lease or contract, and to use, sell, exchange and store the products thereof, conferred by the express provisions of the Act of June 4, 1920, had ample power to enter into the contracts and leases in suit, and that the said Secretary of the Navy in the execution of said contracts and leases exercised that power.

4. In holding that the contracts between the United States and the Transport Company, dated April 25 and December 11, 1922, were void because providing for the establishment of naval fuel depots at places where such had not been authorized by Congress; and in not holding (1) that the Navy fuel depot at Pearl Harbor had been lawfully established long prior to such contracts, and (2) that the Act of June 4, 1920, fully authorized the Secretary of the Navy to store at Pearl Harbor petroleum products received by the Government as a result of the operations of the naval petroleum reserves.

5. In holding that the contracts between the United States and the Transport Company of April 25 and December 11, 1922, were void because proposals therefor had not been publicly advertised.

6. In making a similar holding as that referred to in the last specification with respect to leases between the United States and the Petroleum Company dated June 5 and December 11, 1922.

7. In not holding that the District Court erred in its holding that the contracts and leases in suit were invalid because of alleged delegations of authority from the Secretary of the Navy to the Secretary of the Interior therein contained.

8. In holding that the plaintiff was entitled to the relief prayed without showing any pecuniary loss or damage to it resulting from the execution of or operations under the contracts and/or leases in suit.

9. In affirming so much of the decree of the District Court as ordered cancellation of the aforesaid contracts and leases.

10. In holding that the Transport Company was not entitled to retain royalty crude oil delivered to it by the United States in return for fuel oil and facilities for the storage and handling thereof at Pearl Harbor, Hawaii, under the contracts of April 25 and December 11, 1922, but should be compelled to account to the United States for the value of said crude oil.

11. In holding that the United States was entitled to cancellation of the contracts and leases in suit without doing equity by crediting the defendants respectively with expenditures made under and in performance of the terms of said contracts and leases, which expenditures the District Court found were beneficial to the United States and resulted in benefits and improvements to its property which it should retain.

12. In holding that the Petroleum Company should account to the United States for the gross value of all crude oil produced from wells on Naval Petroleum Reserves Nos. 1 and 2 under leases of June 5 and December 11, 1922, and should not be credited with the cost of producing said oil, bringing into production and operating the wells drilled under said leases, and making other necessary and useful improvements upon the leased land in connection with the said production and operation.

13. In reversing that operation of the decree of the District Court which directed that the defendants be credited with the cost price of the storage facilities for crude oil products at Pearl Harbor and the cost price of the fuel oil contents thereof and the actual expenditures of money in drilling and putting on production wells drilled under the aforesaid leases.

14. In holding that the District Court's findings of fact which the evidence was insufficient to support were of little importance and that the case could be disposed of on conclusions upon the law applicable to it without regard to the facts.

15. In not holding that the District Court erred in finding that the Secretary of the Navy was passive as regards, and took no part in directing and making, the contracts and leases in suit, and did not have full knowledge of the contents of, or carefully read or comprehend the documents: for that there is no evidence to support such findings; and in failing to hold that the Secretary of the Navy, pursuant to his lawful authority, with full responsibility directed the negotiations for and executed the contracts and leases in suit.

16. In not holding that the District Court erred in finding that Albert B. Fall, Secretary of the Interior, dominated and directed the making of the contracts and leases in suit and did so pursuant to a conspiracy entered into by him with Edward L. Doheny: for that the said holdings are not supported by the evidence; and in failing to hold that the said Albert B. Fall did not dominate, direct, recommend, request or in any way influence the making of said contracts and leases, and/or the negotiations therefor, and that the same were not the result of any conspiracy between, and were not influenced by any transactions between, Albert B. Fall and Edward L. Doheny.

17. In holding that the District Court did not err in admitting in evidence against the defendant corporation the testimony of E. L. Doheny before the Senate Committee on Public Lands, conducting an investigation in Washington in January and February, 1924, which testimony was the voluntary statement of the said Doheny as an individual and consisted of a narration of past events and was not made as an officer of or in connection with the transaction of any business for the corporations, nor at a time when the declarant held any office in either of the said corporations authorizing him to bind them or either of them by any acts or statements.

18. In not passing upon and holding to be error the action of the District Court in admitting hearsay and irrelevant testimony (a) of conversation between Mr. and Mrs. E. L. Doheny, Sr.; (b) of the personal bank

account of Mr. and Mrs. E. L. Doheny, Jr., and withdrawals therefrom and deposits therein; (c) regarding purchase of a ranch in New Mexico by A. B. Fall, payments therefor, and bank accounts of the said Fall, and of C. C. Chase and of the firm of Fall and Chase, which erroneous rulings were covered by assignments of error filed in the District Court and presented to the Circuit Court of Appeals numbered 22-40, inclusive (R. v. III, 1442-1446).

19. In not holding that the District Court erred in admitting in evidence plaintiff's Exhibits Nos. 173-236 (R. v. II, 623-677) covered by defendants' objections and their assignment of error No. 49 filed in the District Court and presented to the Circuit Court of Appeals (R. v. III, 1449-50).

20. In not reversing the decree of the District Court and remanding the cause with directions to dismiss plaintiff's amended bill.

III.

Argument.

The District Court held that as a matter of law the Secretary of the Navy had authority, under the Act of June 4, 1920, to make for the United States the contracts and leases in suit (R. v. III, 1367-1386), but that as a matter of fact the Secretary of the Navy had not made or authorized the making of said contracts and leases (ib. 1366-7).

The Circuit Court of Appeals held that as a matter of law the Secretary of the Navy did not have authority to make for the United States the contracts and leases in suit and that in view of that conclusion upon the law applicable to the case the disputed facts became of little importance, even though the evidence was insufficient to support contested findings (R. v. III, 1499).

Upon the threshold of this case, therefore, there are found the questions involving the construction of the Act of June 4, 1920, the powers of the Secretary of the Navy thereunder, and whether or not the contracts and leases in issue were authorized thereby.

POINT I.

Under the Provisions of the Act of June 4, 1920, the Secretary of the Navy had Authority to Make the Exchange Contracts and the Leases Involved in This Case.

A. THE LANGUAGE OF THE LAW.

The full text of the Act of Congress relating to the naval petroleum reserves, which was adopted in the form of four provisos in the Naval Appropriation Act approved June 4, 1920, has been set forth on page 14 of this brief.

B. HISTORY OF THE ENACTMENT OF THIS LAW.

We have sketched this hereinbefore, pages 11-14.

The history of the naval reserves, the use for which they were specifically and exclusively created, the long consideration by the Congress to legislation relating to Government oil and gas lands which had been withdrawn from location and settlement, and the imperative necessity for legislation to give effect to the dedication to the exclusive use or benefit of the United States Navy of the petroleum reserves involved in the instant case, combine to assist to a clear understanding and correct construction of the law upon which the transactions now before this Court were based.

Because the applicable legislation was enacted in the form of provisos in the Naval Appropriation Act for the fiscal year ending June 30, 1921, the learned Circuit Court of Appeals referred to it as "casual" and gave to it a construction and application which we shall herein endeavor to show to be unsustainable. The fact that Congress followed a now quite usual custom of attaching general and permanent legislation to an appropriation act in no way affects its construction. There is not a word in these provisos which relates to or limits any part of the statute to which they are attached, and there is nothing in the appropriation clauses of the statute, or elsewhere therein, which

limits or restricts the natural meaning of the provisos. This was a special enactment, complete in itself, relating to a subject which was not included in the general act, and simply placed in the form of a proviso for legislative convenience, or for some other reason which does not affect its meaning and scope.

"This Court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which had gone before."

American Express Co. v. U. S., 212 U. S., at p. 534.

"But it is, nevertheless, a frequent use of the proviso, in federal legislations, to introduce, as in the present case, new matter extending, rather than limiting or explaining that which has gone before."

I. C. C. v. Baird, 194 U. S., at pp. 36-37;

C. & P. Tel. Co. v. Manning, 186 U. S., at pp. 242-243.

The Act of June 4, 1920, contains within itself a complete and comprehensive legislative scheme to repose exclusive control in the Secretary of the Navy as to all matters in connection with naval reserve affairs.

This was the first legislation which had ever been adopted for that purpose.

The statute is broad and sweeping and grants general discretion to the Secretary of the Navy without conditions or limitations, except as to the amount of cash which he is authorized to expend.

The entire responsibility for the handling of these naval reserves was vested in the Secretary, and he was given full discretion.

1. He could theoretically leave them as they were and take chances with regard both to the loss of oil from adjacent drilling and as to the unavailability of petroleum products for naval use when needed. This is covered by the use of the word "conserve" in its narrow sense.

This was not what Congress had primarily in mind,

because it could have been accomplished without any new legislation; and the law had been passed with the idea that active and not inactive methods should be thereafter pursued in order to protect both the oil reserves and the strategic interests of the United States Navy.

The word "conserve" must be construed together with the other language used—and is immediately followed by the words "develop, use and operate." Hence, it is submitted to be clear that an active conservation and not merely a passive conservation was intended by Congress, and that Congress recognized that truest conservation of oil which was intended for the use of the United States Navy might well be accomplished by operating and developing the oil fields—using them—getting the oil to the surface either by lease, development, contract or otherwise taking such steps that this oil should be transmuted into something which the Navy could actually consume, and so locating it that when necessary it would be available for naval service.

It is impossible to construe the word "conserve," used in connection with the other explicit commands of the statute, as directing a policy of inaction. On the contrary it indicates a policy of action—with full power and discretion in the Secretary as to what that action should be.

2. The Secretary could "develop" all or any part of these naval reserves.

The word "develop" can have but one meaning as applied to oil territory, and that is to cause oil to be produced from that territory. He could do this directly by hiring drillers and organizing a field force, if he saw fit.

This would be an "operation" of the property.

Or he could develop the same property indirectly or by contract—that is to say, by hiring the services of skilled oil men to do the necessary work and produce all oil possible, for the account and risk of the United States.

3. Or he could "lease" all or any part of this property.

The term "lease" as applied to an oil property is likewise wholly unambiguous. The meaning of an oil lease is known in almost every State of the Union. It is a contract under which the lessee, at his own cost, charge and risk, takes over the development of the property leased, furnishing all moneys and equipment necessary to produce oil therefrom, and yields to the lessor a stipulated consideration.

4. To emphasize the extent of the Secretary's discretion as to how these lands should be handled, the words "or otherwise" are added after the specific words hereinbefore mentioned.

Inasmuch as the specific words had covered practically all forms of utilizing the territory in question (especially as the word "use" had been employed in addition to the words already discussed), the effect of these two words "or otherwise" is not so much to suggest a definite and additional alternative as it is to emphasize the breadth of the discretion which was intended to be vested in the Secretary. The use of these words shows beyond the possibility of argument that the language "in his discretion" was intended to place in the Secretary of the Navy the untrammelled power to do everything that he saw fit to do with regard to these lands and oil royalties, except to irrevocably dispose of the title to them.

He could not sell or make a gift of this territory.

But he could do practically everything else with it that a private owner could do.

5. As to the leasing power:

The power to lease these lands is absolutely unlimited and unconditional.

a. There is no limit as to the area which could be leased in any or all of the reserves.

In this respect the statute is notably different from certain of the sections of the law of February 25, 1920, in which definite limitations were placed upon the

power of the Secretary of the Interior to lease lands. The latter could only lease lands in the reserves to the extent that producing wells had been developed (Sec. 18).

He could only lease other known oil lands within the public domain—

“in areas not exceeding 640 acres in tracts which shall not exceed in length two and one-half times their width.”

Under Sec. 14 certain other lands could be leased in areas specified therein.

The contrast between these two laws is so clear that it is inconceivable that Congress intended to hamper the Secretary of the Navy with any such limitations as to areas as those by which the Secretary of the Interior was bound under portions of the prior statute.

b. Nor is the Secretary of the Navy limited as to the time for which any lease might be made.

Here, again, there is a clear distinction between the provisions of the law of June 4th and Section 17 of the law of February 25, 1920, in which latter statute it is stated:

“Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years, etc.”

c. There is no limitation as to the terms and conditions, as to royalty or otherwise, which may be introduced in any lease made by the Secretary of the Navy.

Here again this law differs notably from certain provisions of the Leasing Act.

d. There is no limitation as to the purpose for which leases shall be made, except that they must be, in the discretion of the Secretary of the Navy—

“for the benefit of the United States.”

e. There is no condition fixing any particular set of circumstances or motives or reasons which must exist in order to give the Secretary of the Navy power to make any such lease.

If he believes that the interests of the Navy can be

better protected by leasing than by allowing the land to remain untouched, his decision is final and binding; and, as we shall see, cannot be reviewed by the courts, even though the reasons which actuated him do not seem persuasive to the tribunals to which they are presented.

The two leases attacked in this action were directed and made by the Secretary of the Navy, who was fully authorized to do so.

His motives or wisdom cannot be judicially reviewed.

6. On behalf of the plaintiff it is urged that the power given the Secretary of the Navy to "conserve, develop, use and operate" the lands in the naval petroleum reserves "in his discretion, directly or by contract, lease or otherwise," is limited by an implied condition that such development and operation could only be undertaken if drainage from outside sources was threatened. We submit that to so hold would be to write into the law a limitation and condition which it does not contain, and which if thus written in would absolutely prevent the taking out of oil from the land at times when, even if no drainage danger existed, the oil was needed either for the present or the future operations of the United States Navy.

In other words, such a limitation ends the operation of the Naval Reserves for the only real purpose for which Naval Reserves are required, to wit, Naval and strategical use, and the national defense.

But Government counsel have urged strenuously that Congress, in passing the Act of June 4, 1920, cannot be considered as having been "legislating for the national defense."

But if Congress, in passing the Law of June, 1920, was not legislating upon a subject-matter inherently and necessarily connected with the national defense, what was it legislating about?

Is, or is not, the U. S. Navy maintained and operated with reference to national defense plans, to national defense possibilities and to national defense necessities—not only as they exist today, but as those in charge

of the Department believe that they may exist to-morrow?

Were the Naval Reserve lands set aside, or were they not set aside pursuant to the policy of strengthening and aiding the needs of this Navy?

If not, for what purpose were they set aside and why were they styled "Naval Petroleum Reserves"?

If not, what was meant in the order setting these lands aside by the words "for the exclusive use or benefit of the Navy"?

And if the Navy, and these Naval Petroleum Reserves are not to be considered—as they must be considered—of primary importance to the Nation in so far as they help the Nation in its national defense plans and national defense activities, what substance is in the claim that ideas of national defense (by which is meant, not mere commercial, but strategic as well as protective considerations), were not entitled to be considered by the Secretary of the Navy in deciding which of the powers granted him by this law should be exercised and in what manner this exercise should take place?

If he did not and could not base his decisions upon such considerations, upon what grounds would he base them?

7. Plaintiff's counsel further contend that the law did not give the Secretary of the Navy any power to establish, above ground, reserves of petroleum products, but only permitted him, if and when he had any available oil, to "use the oil for current use or exchange it for current use oil."

No such limitation is found in the act.

No such limitation is within the reason of the act.

Any such attempted limitation is inconsistent with the reserve idea for national defense embodied in the designation "Naval Reserves".

Any such limitation would at once strike down one of the important strategical and practical purposes for which these reserves were to be created, i. e., to create something which would not merely theoretically,

but practically, be available for the uses of the Navy at such time as its exigencies might require.

As a practical matter, if this construction were adopted, where would the line be drawn?

What is current use?

Does it mean that the fuel must be put aboard naval vessels on the very day when the exchange is consummated?

If it does not mean this, can it be carried in any shore tank for a week's time?

Would the Secretary have power to carry such products in storage for a month?

If for a month, why not for a year?

How can the line be drawn at any definite period of time?

Why should the line be drawn at any definite period of time, or upon any time basis whatever?

Is not all crude royalty oil and all fuel petroleum which the Secretary receives in exchange for crude in his exclusive charge, and is there anything in the act which prevents it remaining in his exclusive charge until such time as he thinks best to use it?

If he thinks it best to use it on the day when he receives it, and if he is able to do so, has he not the power?

If he thinks it best to keep it for a week, what is there to restrain him?

If he thinks it best to keep it for a year, what language in the law renders this unlawful?

If he thinks it best to keep it without fixing any definite time, but with the idea that it shall be used whenever in the future its use seems best calculated to subserve the interests of the Navy and the United States, what reason is there, either in the terms of the act or any possible motive that led to its adoption, why he should not have this privilege?

We submit that the ground taken by the Government, and which we are endeavoring to controvert, is flatly opposed to the very essence of the spirit and language of the statute.

As we have already shown, it is inconceivable that Congress, without having said so, and having used the broadest general language to the contrary, should, nevertheless, have intended that the unrestricted power to develop, use, operate, and lease could only be exercised in those particular instances where drainage from outside drilling was threatened.

Undoubtedly he might have leased because of that theory.

But also, and we say undoubtedly, he had the right to lease if he believed that the development of the property and the taking of the oil by means of a lease, would operate to the best interests of the Navy, either by the establishment of an above-ground reserve of fuel oil, into which the crude might be exchanged, or otherwise.

Whatever his decision was in this and other similar matters, and whatever the reason for his decision, the jurisdiction and discretion was his and will not and cannot be reviewed by the Courts.

“The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment.”

U. S. ex rel. Ness vs. Fisher, 223 U. S. 683, 56 L. Ed. 610, citing numerous prior decisions of this Court by which, said the Court, “original discussion” is foreclosed on this point.

So wide and sweeping are the powers granted to the Secretary by the provisions directing him to “conserve, develop, use and operate” the reserves “in his discretion,” above discussed, that we submit that these provisions, even had the law contained nothing else, would have constituted a sufficient grant to the Secretary of power to handle and administer, in any way which he might think best, the naval reserve lands and the products of the development, use and operation thereof. To hold that the Secretary could have developed and operated, either by lease, direct action, drilling contract, or otherwise, these lands, and yet have been without power to utilize the products of such development and operation in the ordinary ways in

which such products can be utilized—that is, by using, selling, storing or exchanging the same—would nullify the statute and be wholly unreasonable. In view, however, of the specific provisions upon these points contained in the succeeding phrases of the law, extended discussion thereof is unnecessary. So great was the desire of Congress to give the Secretary unquestioned powers in this regard that they proceeded expressly to vest him with the powers to which we have alluded in connection with the handling and utilization of the oil itself.

8. The Act empowered the Secretary “to use, store, exchange, or sell the oil and gas products” and “those from all royalty oil from lands in the naval reserves, for the benefit of the United States.”

We shall first discuss the meaning of the words “exchange” and “store” independently of the appropriation clause of the Act, and then shall undertake to demonstrate that the latter clause does not limit or modify the exchange and the storage power as it otherwise exists.

9. The power to exchange:

The word “exchange” is clearly the most important word in this branch of the statute, so far as the practical operation of the statute for the benefit of the Navy itself is concerned.

For, remembering that under the former law royalty oils must always be sold, but that this would immediately make the operation of the naval reserves a commercial proposition, rather than a Navy fuel proposition, obviously the only way in which any royalty oils could be turned to account for naval benefit under the terms of the Act was by the exercise of the power to exchange them for other things.

Crude oils cannot be used in naval vessels. Something must be done with them, either by way of refining them or by way of exchanging them for products which can be used.

The Act as originally drawn contained the word “refine” so as to give the Secretary power to “use,

refine," etc.; but in its final form as adopted the word "refine" was stricken out.

This left, as the sole and only mode by which royalty oils could be turned to account for naval purposes, the exercise of the exchange power.

The question then arises—

For what may royalty oils be exchanged?

The plain and ordinary meaning of the word "exchange" is

"a contract by which the parties mutually give or agree to give, one thing for another, neither thing nor both things being money only."

Words and Phrases, first series, page 2546;

23 Corpus Juris, 186-187;

B. & O. R. R. v. Western Union Tel. Co., 241 Fed.

Rep. 170, "Exchange is barter";

Postal Tel.-Cable Co. v. R. R. Co., 248 U. S. 471.

"The distinguishing feature of a barter is that goods are exchanged for goods instead of money; and to constitute a transaction a barter, it is no more essential that the delivery should be made by both parties at the time the bargain is made, than it is necessary, in order to constitute a sale that the price should be paid contemporaneously with the delivery of the goods, which are the subject of the transaction."

Jenkins v. Mapes, 41 N. E. 137 (Ohio).

Benjamin on Sales, 7th Ed., p. 2, says:

"If any other consideration than money be given it is not a sale."

It will be observed that the well recognized meaning of "exchange" contains no limitation whatsoever as to the character or quality of the things which may be the subject of the exchange, or the terms or the conditions of the contract.

The only requisite is that the subject matter must be property other than money.

Personal property whether tangible or in action may be exchanged for real estate or for other personal property of any kind whatsoever and irrespective of time of delivery, place of delivery, quantity, quality or character.

Hence, in the absence of some controlling reason, this is the interpretation which should be given to the word as used in the present statute.

But plaintiff's counsel seek to limit this ordinary, natural, and well recognized meaning. They have always contended that the exchange could only be made for fuel oil, and they have added that this fuel oil must be acquired for current use. They deny that the crude oil from the reserves may be exchanged for storage tanks or the equivalent to that crude oil or products received in exchange, or for any consideration other than petroleum products of one class or another. Government counsel so insisted in the District Court and in the Circuit Court of Appeals. Neither Court agreed, the District Court rejecting the contention entirely and the Circuit Court of Appeals, refusing to go as far as Government counsel have, taking the view that royalty oil may be exchanged for "current fuel oil or facilities for the storage of royalty oils" (R. v. III, 1503).

Government counsel, the Court of Appeals, the District Court and ourselves all agree that the royalty oil may be exchanged for something of a different nature from royalty oil itself.

We say, as the District Court in this case and Judge Kennedy in the *Teapot Dome* case (5 Fed. (2d) 330) have said, that royalty oil may be exchanged in the discretion of the Secretary of the Navy, not only for fuel oil for current use, but for fuel oil which the Navy needs for use at any time, and also for gasoline or kerosene, for Diesel oil, for lubricating oil, and for other forms of petroleum products, and also for any incidental thing and rights which the Navy needs to have or to use in connection with the solving of its naval reserve petroleum and petroleum product problems, of every nature.

On one further point counsel for the Government and the Circuit Court of Appeals and ourselves are agreed, and that is that the power to exchange is not entirely unlimited. We all concur in the view that the

word "exchange" must have some reasonable limitation and that it cannot be extended to unreasonable lengths.

"All laws should receive a sensible construction, ~~and every term should be so limited in their application~~ as not to lead to injustice, oppression or absurd consequence."

Church of Holy Trinity v. U. S., 143 U. S. 457.

We respectfully submit that there is no logical basis for limiting the exchange practice to current fuel oil or to facilities for the storage of royalty oils only.

Why fuel oil for current use? If the Secretary has any exchange power can he not acquire fuel oil which he intends to store for a few months instead of using it immediately, or within such period of time as might be deemed to be current use?

Fuel oil is fuel oil—of the same chemical composition—prepared according to the same manufacturing standards and Navy specifications—whether it is originally destined in the mind of the Secretary (which he may change from time to time) to be used immediately or to be held to some later date.

And we submit that when Government counsel and the Circuit Court of Appeals conceded that some exchange power existed and that this exchange power could extend to any kind of fuel oil, they practically conceded this point, *i. e.*, that fuel oil for storage purposes is just as much within the exchange power as fuel oil for "current use."

In the next place why any distinction between fuel oil of any kind and for any purpose on the one hand and gasoline, benzine, kerosene and other petroleum products on the other?

There is no distinction in the act.

There is no such distinction in logic.

There is no such distinction in any suggestion made by the learned court below.

Is it not clear that the exchange power, if it exists at all, as to oil of any kind, certainly extends to all kinds of petroleum products which the Secretary in his discretion decided that the Navy needed?

In the next place may the very important point be noted that the Court below admits that the Secretary did have power to exchange for at least one thing other than petroleum products of any kind—*i. e.*, that the Secretary could have thus acquired “facilities for the storage of royalty oils” (R. v. III, 1503).

Here is an out and out statement that some tanks or other appurtenances appropriate or necessary for the storage of some kind of oil could, within the meaning of the act, be acquired by the Secretary of the Navy—not for cash, but in exchange for royalty oils.

The effect of this is (aside from the claim of limitation as to amount, which we shall discuss shortly) of the greatest importance, we submit, in this connection as bearing upon the correctness of the conclusions reached by the Court concerning the limitation of the exchange power. For, if some storage facilities could be acquired for any purposes—where within the Act or within its reasonable construction is there room for any distinction based upon whether the storage facilities—these iron tanks and pipes, etc.—are intended to be used for the storage of royalty oils, or fuel oils, or gasolines, or anything else—or based upon any distinction between whether any of these liquids are to be stored for “current use” or for some longer period?

It seems to us that the theory of the Circuit Court of Appeals makes the validity of the exercise by the Secretary of the Navy of his exchange power, dependent upon his mental attitude at some particular moment of time.

Thus, the Court holds that the Secretary may exchange royalty oil for fuel oil—but qualifies this by insisting that he must intend this fuel oil for current use.

And the Court also holds that the Secretary had power to exchange royalty oil for storage facilities—but again qualifies this statement by saying that these storage facilities must be intended “for the storage of royalty oils.”

We submit that distinctions of this nature have no basis in the law or in logic.

If the Secretary could acquire fuel oil in this manner, then even though he intended it at the moment of acquisition to be used for current use, he could immediately thereafter decide to hold it for a time, *i. e.*, to store it. And if the Secretary could acquire any storage facilities in this manner, he could, even though he originally intended them to hold royalty oils, change his mind at any moment and fill them with fuel oil.

When the physical things themselves are from their very inherent nature capable of being applied to one purpose or another, it cannot be true that the validity of contracts for their acquisition depends upon the thought of the public official acquiring them, at the moment of acquisition, as to the purpose to which these chattels were eventually to be applied.

There is but one logical limitation of the exchange power contained in these general words, and that is that it must be exercised in the discretion of the Secretary for some purpose not merely relating to the Navy Department as an entirety, but related to the Naval Reserve, petroleum and petroleum products problems of the Navy Department.

If the law under consideration had given the Secretary sole discretion as to every matter connected with the administration of the entire Navy, then possibly he would have been able to exchange royalty oil for new navy yards or battleships.

But while it gave him no such unrestricted discretion as to all naval matters, it gave him ample discretion as to all Naval Reserve and petroleum matters.

This construction is the only reasonable one in view of the clear purpose of the law. And the contracts here attacked were within the scope of this reasonable discretion.

10. The power to store:

We discuss the powers of the Secretary separately, noting, however, that the power to store was exercised in this case in conjunction with and through the power to exchange and the power to lease. Despite

the detailed and separate analysis, the Court will bear in mind in determining the breadth of the Secretary's power over the products of the reserves that the law authorized him "to use, store, exchange or sell the oil and gas products thereof and those from all royalty oils from lands in the naval reserves."

The District Court held that out of the combined powers to exchange and store the Secretary of the Navy had authority to exchange crude oil for fuel oil, and other petroleum products, and storage facilities therefor.

The Circuit Court of Appeals held that under these combined powers the Secretary of the Navy had authority to exchange crude oil for fuel oil for current use and to exchange crude oil for "facilities for the storage of royalty oils" (R. v. III, 1503), but that he did not have authority to exchange crude oil for fuel oil and for tanks in which to store that fuel oil.

Both of the courts below, therefore, have held that the Secretary had power to exchange crude oil from the naval reserves for refined petroleum products and for storage facilities, the Circuit Court of Appeals, however, insisting upon writing into the statute a limitation upon these powers to exchange and store which is not found in the legislation itself.

The power to acquire storage facilities as well as petroleum products through the exercise of the exchange power is directly within the many cases holding that where a particular power is granted, everything necessary to carry out the power and make it effective and complete will be implied from the language of the statute.

"The intention of the lawmaker constitutes the law. What is clearly implied in a statute is as effectual as what is expressed."

Telegraph Co. v. Eyser, 19 Wall., 427.

"What is implied in a statute is as much a part of it as what is expressed."

County of Wilson v. The Bank, 103 U. S., 778.

"It is also elementary that when a power is conferred by statute, everything necessary to carry out the power and make it *effectual and complete*, will be implied."

Dooley v. The Railroad, 250 Fed., 143.

"The privilege carries the right to use all appropriate and reasonably necessary means and agencies."

Ex Parte Yarborough, 110 U. S., 658;

McHenry v. Alford, 168 U. S., 672;

Great Northern Co. v. U. S., 155 Fed., 959;

Gelpcke v. Dubuque, 1 Wall., 220;

U. S. v. Babbitt, 1 Black, 61;

Steel Co. v. U. S., 235 U. S., 460;

In re Neagle, 135 U. S., 7;

Loan Ass'n v. Topeka, 20 Wall., 655;

U. S. v. Engine Co., 91 U. S., 321;

New Mexico v. Trust Co., 172 U. S., 171;

McCulloch v. Maryland, 4 Wheat., 407;

Luria v. U. S., 231 U. S., 9;

U. S. v. McDaniel, 7 Pet., 1;

County of Wilson v. The Bank, 103 U. S., 778;

Royalty oil, fuel oil, or any other form of liquid or gaseous petroleum products, cannot be handled except in containers.

And unless containers exist at the spot where the Secretary, in his discretion, deemed it necessary that crude petroleum or its products should be located, or unless these containers were adequate in kind and capacity to hold such petroleum or its products, the providing of them was just as much a part of the Secretary's duty as the providing of the petroleum or its products themselves.

Great emphasis is placed upon this by the use of the word "store" as well as "exchange" in the law.

The containers were, or might necessarily be, incidental to the execution of the exchange power.

And to deny that this power was granted by the express use of the word "store," as well as by the necessary and proper interpretation of the word "exchange" as an incidental thereto, would be to limit

the exchange power to cases and places where containers already exist—a construction which, in view of the comprehensive plan to administer the Naval Reserves and to supply the needs of the Navy as to fuel and other petroleum products, would simply defeat and not effectuate the clear intent of Congress.

The results which would flow from any construction of the statute which, while admitting that the Secretary of the Navy could acquire storage facilities for royalty oil in exchange for royalty oil itself, would prevent him from acquiring such storage facilities if they were to be used for fuel oil received in exchange, would be so illogical and, we think, so unreasonable, as to make it practically certain that no such intention was in the mind of Congress.

Assume that the Secretary of the Navy in his discretion—which is conceded—desires to acquire a certain amount of fuel oil. Assume that he has on hand royalty oil which is available for exchange for such fuel oil. Assume, if we please, though this is not necessary, that it is for any one of a number of reasons greatly to the advantage of the Navy to exchange this royalty oil for fuel oil rather than to sell it for whatever price may be obtainable, and to turn the money in to the treasury, and in addition to this let us assume that at the place where the fuel oil is urgently needed there are inadequate storage facilities, as, for instance, at the Brooklyn Navy Yard or any other similar place where perhaps some storage facilities exist, but not enough to hold the fuel oil which is to be acquired.

How absurd, we submit, it would be in the face of so broad a statute as this, enacted for such purposes, to refuse to allow the Secretary to make the contemplated fuel oil exchange and at the same time to provide a tank or tanks at the navy yard without which the fuel oil could not be handled if thus received unless he first and in each case obtained special statutory approval! It is earnestly submitted that there could be no reason for the limitation suggested, that all reason is against

it, and that there is nothing in the act or in the public policies of the country which requires its establishment.

And this is exactly the sort of situation which was met in this case by the passage of this general act vesting discretion in the Secretary.

Our adversaries have suggested that power to store is limited to royalty oils and not to fuel oil received in exchange, because the statute says:

“To use, store, exchange or sell the oil and gas products thereof, and those from all royalty oil from lands in the Naval Reserves,”

adding that fuel oil produced from some other crude oil and received by the Government in exchange for its royalty oil does not come within the foregoing category since it was not produced from Naval Reserve royalty oil.

The untenability of this is instantly apparent when we remember that if the Secretary could not store fuel oil received in exchange, then since all these powers are covered in the same sentence and have the same limitation, neither could he use fuel oil received in exchange. No such argument can possibly be valid.

Not only the words “use, store, exchange or sell,” as applied to the products particularly, but the words “conserve, develop, use and operate” the entire Naval Reserves, place it beyond doubt that Congress never intended any such finespun distinction, but that the Secretary of the Navy’s power as to handling and disposing of crude petroleum and any refined forms of petroleum, extended not only to crude petroleum directly produced by the Government from these lands and to royalty crude petroleum, but also to all refined products from petroleum either produced directly by the Government itself from Naval Reserve lands, or received by the way of royalties, or acquired by the Government in exchange for oil either produced by the Government or received by way of royalties. If the Secretary were held to have no power to store fuel

oil which he acquired in exchange for royalty oil, his exchange power in the absence of adequate storage tanks already existing where he desired the fuel oil delivered would vanish unless the fuel oil received in exchange could be instantly delivered on board the particular ship where it would be actually consumed, and unless such ship were available at the time and place where the exchange were effected and at the very instant of the exchange.

We submit that the mere statement of such an argument, keeping in mind at the same time that without question the idea of an available fuel reserve was one of the ideas which led to the passage of the statute, shows the fallacy of the Government's contention.

11. Manifestly the question of the proper interpretation of the statute, cannot be affected by the amount of royalty oil which the Secretary, in the exercise of his discretion, may determine to exchange for fuel oil and/or its containers.

Counsel would doubtless disclaim any intention to seriously argue that if the Secretary of the Navy has discretion in this regard, the Court has power to review his discretion upon the theory that too much or too little royalty oil has been devoted to any particular purpose.

And yet counsel have on previous hearings interwoven in their argument suggestions that the enormous quantity of royalty oil which might have been devoted by the Secretary to the acquiring of above-ground reserve fuel oil, including containers therefor, somehow characterizes and qualifies his act and renders it more subject to judicial review.

The point, if made, that the setting aside of a substantial amount of royalty oil for the construction of tanks and plant would constitute a diversion thereof from the fuel purposes of the Navy and that, therefore, the statute of June 4, 1920, should not be interpreted so as to permit this to be done, is disposed of when it is remembered that before this statute was

passed all royalty oil was sold, and thus was diverted from the fuel purposes of the Navy.

Moreover, every lease of any part of the Naval Reserves lands, every drilling contract which the Secretary might make with an operator, and even the exchange of royalty crude for fuel oil itself—which Government counsel and the courts below concede to be legal—involves some loss of the total amount of royalty oil which otherwise would be in the possession of the Government. For no such transaction could take place without the lessee or drilling operator being entitled to a part of the product, or the other party to the exchange of crude oil for fuel oil obtaining more royalty oil in volume than the amount of the refined product which he gives in exchange therefor.

POINT II.

The Appropriation Clause Does Not Limit the Power of the Secretary of the Navy Under the Act, except in the Expenditure of Cash.

The District Court so held. The Circuit Court of Appeals held otherwise.

1. The language of this clause is:

“Provided, further, that such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the Naval Petroleum Reserves to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922;

“Provided, further, that this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States, at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.”

2. Our position is that this appropriation was not in the least degree intended as a limitation upon any power, but solely as an aid to the execution of such powers as might require the use of cash.

3. The Government's contention upon this point is, in substance, that except for this appropriation, the statute has no validity, and the extent of the powers granted is dependent upon and limited by the amount of the appropriation made. They refer to Section 3732, R. S. U. S., providing that "No contract . . . shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfilment" This statute recognizes two alternatives as to the existence of powers to contract—one an express grant of power and the other an implied grant existing from an appropriation of money for a given purpose. That either of these alternatives empowers the official to act is settled:

Chase v. U. S., 155 U. S., at p. 502;

Fowler v. U. S., 3 Ct. of Cl., 43;

Shipman v. U. S., 18 Ct. of Cl., 138.

4. The powers of the Secretary of the Navy under the Act of June 4, 1920, do not depend upon the cash appropriation, as would be the case in instances where the only basis for any power at all was the existence of such an appropriation.

"The first clause of section 3732 applies to direct authority to contract granted by statute. The second clause covers an implied authority arising out of the appropriation of means."

19 Op. Attys. Gen., at 654.

15 Op. Attys. Gen., at 235.

Under this statute, therefore, which contained express grants of all these powers, it is submitted that if there had been no appropriation clause at all the Secretary of the Navy would have had complete powers over the Naval Reserve and its products so far as Naval Reserve petroleum and fuel matters are concerned, with one exception, to wit, that he would have had no money to spend.

But even under such circumstances it would not only have been his right but his duty to administer the Naval Reserves, to take possession of the properties,

to administer them in such way as he thought best, to exercise his discretion as to developing them, using them or operating them, as might seem most fitting; to decide whether the products should be used, stored, exchanged or sold, and in all other respects to have exercised the discretion and fulfilled the mandate expressly conferred upon him by Congress.

As to some of these faculties there can, we submit, be no question but that it would have been his right and his duty to exercise them, even if no appropriation had ever been made.

What has an appropriation to do with a lease of lands involving no expense to the Government?

What has an appropriation to do with a development contract other than a lease, as long as no money expenditure was required?

What has it to do with a sale or exchange or the use of the products derived from any such development?

Nothing, we submit.

But Congress, in addition to imposing these duties (be it remembered that the word "directed" is the one that is used in the law) saw that the Secretary might need money for some of these tasks and proceeded to authorize him to spend \$500,000 "for this purpose until July 1, 1922."

The phrase "for this purpose" is general, and, so far as language goes, applies to the entire scope and meaning of the act. It is not specifically applicable to any one or more powers.

The Circuit Court of Appeals construed it as limiting the power of exchange, to wit, a power in the exercise of which it was not necessary for the Secretary to spend one single dollar of cash belonging to the United States—although no such limitation is specified by the statute.

But, we submit, such an interpretation of the statute entirely disregards the obvious purpose for which the appropriation was authorized, which was to furnish

money available to the Secretary for use in connection with matters where he could not do his duty unless he had money to spend.

In other words, the appropriation was not intended to derogate from and limit the broad powers theretofore expressly granted in the act, but was intended simply to aid the Secretary to exercise such of the powers as could not be exercised unless he had money at his disposal.

When this appropriation is considered as an aid to the exercise of certain powers theretofore expressly granted, and not as a limitation upon any power whatsoever, the entire situation becomes perfectly clear.

Distinctions would immediately be drawn upon the only possible lines, to wit, between powers which could only be exercised by the use of money—as, for instance, if the Secretary wished to have the Navy Department itself drill wells, etc., upon Naval Reserves—and on the other hand powers in connection with the exercise of which no money whatsoever was needed—as, for instance, the making of a lease or other development contract involving no expense, the sale of royalty oil to any extent whatsoever, including only the taking in and not the giving out of money, and the exchanging of royalty oil for any purposes within the fair scope of the statute, wholly irrespective of whether the amount of such royalty oil were \$500,000 or \$5,000,000.

The appropriation aids the Secretary in the exercise of the first class of powers, not because it creates or defines the power itself (which is already granted by the law), but because the power itself is of such a nature that it cannot be exercised without the existence of an appropriation and the ability to spend money thus appropriated.

Thus considered, the appropriation clause instantly reconciles itself with the balance of the statute.

Another consideration is worthy of note, and that is that, even under the interpretation of the appropria-

tion clause given by the Circuit Court of Appeals, this \$500,000 cannot be the final limit because in a proper case it could be renewed and re-renewed under the last clause of the statute by being reimbursed out of any other "proper appropriations."

Lastly, may it be noted that the appropriation in question was only available, under the language of the proviso, until July 1, 1922.

If the construction given by the Court below were correct, then, even though not one single dollar of this appropriation had been spent before the date mentioned, all of the powers of the Secretary, even though they involved no use of money, would have ceased to be exercisable after the date mentioned.

There can, we submit, be no acceptance of the Court's argument unless it be carried out to its complete conclusion, and that involves the question of time as well as the question of amount.

We believe that any interpretation which makes the exercise of these general powers to conserve, to lease, to exchange, to sell, etc., after July 1, 1922, dependent upon whether Congress has seen fit to make a further appropriation or to extend the time within which the original appropriation could be employed, would not be found by this Court, after full consideration, to be admissible.

As to the Reimbursement Clause:

The Court is asked to note:

1. This clause does not come into play unless some part of the \$500,000 appropriation is spent.

2. Even if this expenditure takes place, the reimbursement clause does not come into play unless it is spent for some purpose covered by another "proper appropriation."

3. It does not apply unless "oil and gas products from said properties" are "used by the United States."

4. The clause refers to the "use" of royalty oil for fuel and the use of a part of some fuel appropriation to

reimburse the \$500,000 appropriation if some part has been spent.

5. And the draftsman of the appropriation clause doubtless had in mind the possibility that the Secretary might himself refine some of the royalty oil and use for current consumption a part of the products therefrom, in which case he would be saving the Government a part of the cash appropriation which otherwise would be called upon to furnish fuel for the Navy. The word "refine" was in the bill as originally drawn.

But the word "refine" was stricken out of the bill before it was adopted.

6. As a result, royalty oil cannot be refined and thus directly used for fuel purposes.

7. This reimbursement clause was not intended to, and does not, in any way modify any of the general powers of the Secretary, cut down or eliminate his power to exchange, or operate adversely as against any of the arguments which we have set forth.

POINT III.

The Contracts of April 25 and December 11, 1922, Were Intended to Be and Were Exchange Contracts Within the Meaning of the Law. This is True Despite the Provisions Thereof by Which the Quantities of Crude Oil and of Fuel Oil to be Delivered Were Made Variable in Cases of Variance of the Reference Prices of These Two Commodities.

This position was upheld by the District Court (R. v. III, 1380-1386).

The Court of Appeals did not discuss this point.

The Government contends these were "sale" and not "exchange" contracts.

Before entering into this discussion let us call attention to a point which was overlooked in the arguments of our adversaries in the District Court, which is—

That the statute gives the Secretary of the Navy full power to make both kinds of contracts.

The words "sale" and "exchange" are both used in the act.

We shall develop this point more fully later; but at the moment we simply submit that our adversaries cannot by any possibility show that these contracts are illegal by drawing distinctions between these two classes of agreements.

If they were not exchanges—they certainly were sales.

And whichever they were, the Secretary of the Navy was given express power to make them by the language of the act.

In other words, the inclusion in the statute of both words "sale" and "exchange" removes from the necessity of discussion the many decisions which have been rendered in litigations where the point involved was as to the scope of a statute or other writing where only one of these words was used, such as where powers of attorney to sell but not to exchange are construed.

1. These contracts were exchange contracts and were so intended.

In Articles II and III of the contract of April 25th it is said:

"It is the intention of the parties hereto to effect an exchange of crude oil * * * for fuel oil * * * to be delivered by the contractor * * * into storage facilities to be constructed and erected by the contractor" (R. v. I, 28);

and in the supplemental contract of December 11, 1922, it is provided that—

"Whereas, a certain contract was entered into by the above named parties, dated April 25, 1922, providing for the exchange of royalty crude oil belonging to the Government and produced from Naval Reserves Nos. 1 and 2 in the State of California for fuel oil in storage at Pearl Harbor, T. H., including tanks and incidental facilities * * *, and whereas said contractor has expressed a willingness to furnish the desired amounts (i. e., an increased quantity) of fuel oil and other petro-

leum products in storage in exchange for crude oil in the field" (ib. 41).

Then follow the contractor's obligations and after that it is provided in Article II that—

"For the considerations herein mentioned and contained, to wit, the furnishing of oils in storage and facilities and options as specified above, the Government agrees (a) to deliver in exchange to contractor all royalty oil, etc." (ib. 47).

No cash was intended to pass in connection with this arrangement.

These contracts will be seen by an examination of the terms of the statute and the authorities to be fully authorized by the law.

2. The position which the United States takes in connection with these two contracts is, that even though the Secretary might be deemed to have power to exchange crude oil for fuel oil in storage, nevertheless under the terms of the contract of April 25th that contract was not a true contract of exchange for the reason that the quantity of crude oil deliverable thereunder might have increased or diminished from the number of barrels specified therein.

The provisions of the contracts upon this point may be stated as follows:

(a) On April 25, 1922, the price of crude oil in the field was \$1.10 per barrel.

(b) The price of fuel oil at the California coast was \$1.50 per barrel.

(c) It was recognized that deliveries of fuel oil would be made by the contractor at various dates thereafter and that the price of such fuel oil might at the date of delivery of a given quantity vary from the reference price of \$1.50 per barrel specified in the contract.

(d) It was also recognized that the delivery of royalty oil would be made at various times during a long period until the cost of Pearl Harbor storage and the fuel oil to fill it was defrayed and that at the vari-

ous times of such delivery the published field price of such oil might vary from the reference price of \$1.10 published in the contract.

(e) To properly protect the interests of the United States and of the contractor and to avoid the necessity of making a purely hazardous and gambling contract which might become a burden upon or work an injustice to either party, it was provided in the April 25th contract that the quantities of crude oil delivered on the one hand and of fuel oil deliverable on the other should be subject to change from the amounts originally estimated, such change being proportionate to the changes in price above alluded to of these respective commodities.

(f) So far as the contract of December 11th was concerned it was not a lump sum contract. It was, however, provided that all crude oil delivered to the contractor should be delivered at the published field price on the date of delivery and that all fuel oil delivered by the contractor to the Government should be delivered at the market price thereof at the date of delivery at the California shipping point plus the going rate for transportation to Pearl Harbor.

(g) In other words, both of these contracts contemplated inevitable changes in price of the two commodities; and for the reasons above stated made the quantities respectively deliverable in final adjustment of the obligations of the parties depend upon the extent of these price changes.

(h) But it will be noted that no provision in either contract contemplates the payment of one dollar in cash by either party to the other at any time, in connection with the construction of the Pearl Harbor plant, whatever may be the fact as to differences in valuation of the commodities involved.

In other words, while the quantity of the commodity was dependent upon price changes to a certain extent, there was never to be delivered by either party to the

other in connection with the Pearl Harbor construction anything but property of the kind and quality specified; and under no circumstances was any payment of money to be made.

(i) The plaintiff asserts, however, that the determination of quantity by reference to varying market prices of the two commodities takes the case out of the category of exchanges and requires it to be described by some different denomination—presumably a sale on the one hand of royalty oil and a purchase on the other of fuel oil and of storage facilities.

3. This contention is, we submit, conclusively disposed of by the decision of this Court in *Postal Tel.-Cable Company against Tonopah Railroad Company*, 248 U. S., 471.

This case decided three appeals taken from different lower courts, all involving the construction and effect of the standard form of contract entered into between railroad companies and telegraph companies for an "exchange of services," throughout the U. S.

These contracts were all made under the provisions of Section 1 of the Interstate Commerce Act, as amended in 1910, which provided:

"Nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

The essential facts involved in these contracts were:

(1.) That the railroad company agreed to transport employees and materials of the telegraph company free up to an amount not exceeding \$10,000 per annum, calculated at the current transportation rates of the railroad, it being provided that as to excess transportation, the telegraph company should pay the railroad one-half of its aforesaid rates.

(2.) The telegraph company in exchange for the foregoing agreed to transmit messages of the railroad company up to the same amount of \$10,000 per annum,

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calculated at the regular day rates of the telegraph company, and excess messages to be paid for at one-half the telegraph company's regular rates.

(3.) Settlements between the parties were to be made yearly.

It will be noted that the question of how many messages the telegraph company should send was determined solely by reference to its regular rates of charge; and the question of how much transportation should be given by the railroad company was likewise determined by reference to its regular rates.

It will be also noted that the rates which formed the basis were the "current transportation rates of the railroad" and the "regular day rates of the telegraph company."

In other words, the contract was not for the transportation of a given number of men, or a given number of tons of freight on the one hand, and a given number of telegraph messages on the other, but in each case the quantum of the service to be rendered was to be fixed by reference to a changeable cash standard; that is to say, such amount of service, as based upon the cash standard for the unit of service, should equal a given aggregate sum.

The situation disclosed by these contracts was almost the identical situation established by the exchange contract in this case.

This Court held that these transactions constituted an exchange, and upheld as valid and within the statute, the arrangement embodied in the contracts. And this decision could not have been reached had plaintiff's contention in this case been good law.

Plaintiff's counsel have naturally made strenuous efforts to escape the effects of these cases, claiming below that:

"In every one of these decisions the Court speaks of what is normally an exchange contract and distinguishes an exchange contract in its true

essence from the thing that Congress was talking about here."

An examination of the following quotations will show that the courts certainly did feel called upon to define the meaning of the word "exchange" in its normal and legal interpretation, and they certainly did so define it.

They also examined the history of the enactment for the purpose of ascertaining the intention of Congress; and as a result of this examination, not only the lower courts, but this Court, decided that Congress had used the word "exchange" not in an abnormal sense, but in its normal and accepted legal meaning; and from both points of view (*i. e.*, the normal meaning of the word "exchange" and the intent of Congress as determined by the Court), the same result was reached, to wit: that the contracts under consideration constituted true exchange contracts and that as such they were intended to be permitted by Congress not only as regards "on line" services, but "off line" services.

We are sure the Court will pardon us if we trace and analyze these decisions in some detail.

Judge Mayer in *B. & O. R. R. v. Western Union Telegraph Company*, 241 Fed. Rep., 162 in his opinion, commencing on page 169 and ending on page 174, discusses the meaning of this word, first, as it normally would be under the accepted legal rules as to what constitutes an exchange, and, second, as the term was intended to be used by Congress in this statute.

And from both of these analyses he reaches the same conclusion, to wit: That the contracts were themselves exchange contracts and that Congress intended to legalize them as such.

We quote as follows:

"Whether the meaning of the 'exchange of service' is determined by (a) the narrow test of verbal literalism, or (b) the broader rule of ascertaining the intention of the Congress from the language used in the Act * * * by a resort to the

history of the times when it was passed (166 U. S., 290), the result is the same" (p. 170).

"(b) Where, in addition to the language of the statute, considered by itself, the intention of the Congress is sought in the light of relevant history, the construction already indicated is amply confirmed."

Let us now pass to the decision in the same case in the U. S. Circuit Court of Appeals of the Second Circuit reported in 242 Fed. Rep., 914.

This decision was rendered by Judges Ward, Rogers and Hough. The Court after summarizing the agreement, said:

"At stated periods the amount of 'off line' business transacted by each for the other, is ascertained and balances discharged (as in a clearing house) at a rate of settlement or exchange fixed at one-half of the ordinary rates of each party to the agreement. The right to do this is the only question in this case."

The Court then quotes the statute, and proceeds to say:

"In our opinion (in the absence of fraud) the right to exchange implies the right to fix the rate, method, or amount of exchange. The agreement being to exchange the carriage of goods against the transmission of intelligence, each party has the further right to fix the value of the services of each to the other; it makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course" (pages 915-916).

In *Chicago Great Western R. R. Co. v. Postal Telegraph & Cable Company*, 245 Fed. Rep., 592, the District Court of the Northern District of Illinois, construing another one of these same contracts, reached a decision contrary to that which Judge Mayer had arrived at. But the decision of Judge Evans was reversed on appeal by the Circuit Court of Appeals of the Seventh Circuit, 249 Fed. Rep., 664, where that Court follows the Circuit Court of Appeals for the Second

Circuit, and says that it finds no additional facts that ought to change the situation presented in the other Courts.

This Court affirmed the decision of the two Circuit Courts of Appeal above examined, and in the opinion (248 U. S., 471) said:

“The contracts elaborately provide for the reciprocal rights of the companies, for a division of expenses between the railroad and telegraph, for the use by the telegraph of the railroad’s right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employees of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. . . . The question more specifically stated is whether the construction adopted by the Commission is right.

“We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission

to settle accounts periodically instead of paying for each transaction in cash. But 'exchange' is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way.

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"Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other."

After following precisely the two different routes which had been previously followed by the other Courts, the opinion of this Court concludes as follows (248 U. S., 471, at 476) :

"We do not go into more minute discussion because the result reached must stand on the plain words of the Act, the meaning of which is confirmed rather than made doubtful by the circumstances in which the proviso was enacted and the events that had gone before."

Clearly the intention of Congress and of the Courts was not to give or uphold an abnormal meaning of the word "exchange," but to use it in its normal meaning as conclusive in favor of the validity of the contracts then under consideration.

Counsel for the United States referred below to the following sentence contained in the opinion of this Court (248 U. S., 471) :

"Exchange is barter and carries with it no implication of reduction to money as a common denominator."

It has been urged that this Court, in using this language, meant that an exchange must not carry with it any such implication.

We submit that this sentence, instead of conveying such a meaning, clearly means that an exchange does not necessarily carry with it the implication in question.

The entire accuracy of our contention on this point is at once manifest when the situation in the Railroad-Telegraph case in this Court is examined.

For in that case the Telegraph Company and the Interstate Commerce Commission were arguing that the exchange of services covered by the contract must be calculated at the regular rates therefor.

See brief of the Western Union Telegraph Company in this Court in which it is said, on page 14:

"Both terms (*i. e.*, 'exchange' and 'contract') imply the fixing of terms dependent upon the special situation of the particular parties contracting or exchanging. . . . Such exchange implies valuation by each of the services to be furnished or rendered to or by the other."

Similar ground was taken by the Interstate Commerce Commission.

If this argument had been valid, the exchange clauses at half rate would have been void as to "off-line" services.

The appellees in these cases denied the validity of the foregoing arguments, urging that since the contracts were contracts of exchange, there was no compulsion to refer them to the regular cash rates:

"It is contended by the Commission that the exchange of services provided for must be an exchange of such services calculated at the regular rates. *Non constat* if the contract could be analyzed and valuations could be placed upon the rights and all the multitude of services and bene-

fits derived by each of the parties thereto, it would transpire that the services are exchanged at greater than regular rates. But that is not the point.

“The first fallacy lies in the idea that the exchange must be measured by dollars. . . .

“To exchange services for services does not require that the services shall be translated into dollars. That would be merely keeping books and not exchanging services at all” (Brief of Baltimore & Ohio R. R. C., pp. 39-40).

This Court upheld the contention of the appellees, decided that an exchange did not necessarily require a reduction to money as a common denominator, and the opinion then proceeded to say—similarly to what had been held by the Circuit Court of Appeals of the Second Circuit—that an exchange—

“contemplates an estimate determined by self interest of the relative value and importance of the services rendered and those received.”

The parties are not compelled to reduce the terms of their exchange to money.

But they have a perfect right to do so. As was said by the Circuit Court of Appeals of the Second Circuit (242 Fed., 915):

“It makes no difference whether for convenience they ascertain that value by the usual money measurement or adopt some other course.”

The striking similarity of the Railroad-Telegraph cases to the contracts now under discussion, is apparent when we note:

(a) That no tangible and identified property passed in either case at the time the contracts were made.

In each of the cases the contracts had reference to things covenanted to be done in the future.

(b) In both the Railroad-Telegraph cases, and in the one at bar, the contract simply operated to create mutual executory rights—the rights granted by the one party being exchanged for the rights granted by the other. Some of these rights in the case at bar are in the nature of options.

In the Railroad-Telegraph cases these rights had reference to the rendition of services by each party for the other at future times—to an indefinite extent and at uncertain periods.

In our case the things to be done were somewhat more distinctly specified; but the principle of the two cases is identical.

(c) The question of whether or not the contracts contain complicated and interwoven provisions is wholly immaterial as bearing upon the validity of the exchange.

Plaintiff's counsel attempted below to make much of what they term "a medley" of obligations.

This specific point, however, existed in the Railroad-Telegraph cases and is alluded to in the opinion of this Court:

"No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other" (248 U. S., at page 475).

(d) In each of the cases the reference to a money standard is not made for the purpose of ascertaining a sum of money which is to be paid by one party to the other.

The only object of the use of the money standard is to ascertain the amount of the consideration deliverable on each side.

(e) Counsel's comment, below, upon the fact that if the Government made a delivery of royalty crude oil to the contractor at any time, a credit would be built up in favor of the Government, to be discharged later, and that therefore the transaction cannot be considered as an exchange, is likewise met by a precise set of facts in the Railroad-Telegraph cases.

In these cases it was entirely uncertain which party would render services to the other first, or how the balance might stand at the end of any yearly period.

In the meantime, and until a balance was struck,

there would, of course, be a credit established in favor of each party against the other, and a balance of credit in favor of the party who had rendered the greater services.

This situation did not take the case out of the category of an exchange contract.

And the same situation would be presented in every case of a continuing exchange contract unless—which probably never would happen—all future exchanges were exactly simultaneous and involved the delivery by each party to the other of quantities of their respective articles which exactly balanced the quantity received at the same time.

4. Our adversaries have pointed to the provisions of Article II, Paragraph "A" of the December 11 contract, to the effect that after the Government has delivered enough royalty oil to the Transport Company to liquidate all Pearl Harbor obligations it shall still continue to deliver the royalty oil for fifteen years from the date of the expiration of the April 25 contract, and shall be entitled to receive in exchange therefor at its option either fuel oil, other petroleum products, additional storage facilities or cash. They claim that the optional right of the Government to demand cash for this excess royalty oil renders the entire contract one of sale and not of exchange.

This argument disregards the fact that the clause in question is a purely incidental and minor term of the whole contract; that it does not in any way relate to Pearl Harbor but only comes into operation after that entire work has been done and reimbursed through the operation of the exchange contract; that the provision in question is not an absolute provision, but is contingent and purely optional at the will of the Government, and lastly that, as we shall immediately show, even if to this extent the excess royalty oil over and above the Pearl Harbor quantities is considered as sold by the Government instead of exchanged, such a

sale is entirely within the power of the Secretary of the Navy to make.

If for any reason this clause could be held to be void as a part of an exchange contract, the District Court below was correct in saying that it would only vitiate the December contract "to a limited extent and not totally," and as no attempt has been made to effectuate such provision or option, its effect is immaterial in this case. (Citing cases, *R. v. III*, 1382.)

5. Our adversaries cited below a number of cases in support of the proposition that where there is a reference to money, or, as some of the quotations say, a "fixed price," the contract is one of sale even though consideration is not paid in money but by the transferring of certain specified real or personal property.

Based upon these authorities, they reached the conclusion that the contract in question was a sale.

Subsequently counsel for the first time realized that the Law of June 4, 1920, not only gave the Secretary of the Navy power to "exchange" royalty oil, but to "sell."

Seemingly it then became clear to them that if the authorities upon which they relied succeeded in bringing this transaction into the category of "sales" rather than "exchanges," they would still have failed to successfully attack the power of the Secretary to do what he did.

For the purpose of evading the second horn of this dilemma into which they then saw that they had entered, they cited sections of the revised statutes providing that "all moneys received," etc. (Section 3617), and "all proceeds of sales" (Section 3618), from the sources therein mentioned, shall be covered into the Treasury of the U. S.

They then proceeded to argue that because in this case there are no proceeds in the form of money which could be thus "covered into the treasury," hence the Secretary of the Navy would have no power to make

the transaction in question, even if it were considered a sale.

But Sections 3617 and 3618, to which they refer, do not have the remotest bearing upon the validity of a contract like the one in question here, made pursuant to the provision of a special law, but only amount to directions by Congress to the Government executive officers as to what specific use shall be made of certain moneys or "proceeds of sale" if such proceeds be in the form of money, which may result from certain transactions.

To hold that these provisions, which are solely, as we have said, in the nature of instructions to the officers of the Government, could be so construed as to invalidate contracts which did not result in money coming into the hands of these officers, but which contracts are expressly authorized by Congressional enactment, is to commit an absurdity which to be fully appreciated only needs to be stated.

Counsel to evade this point said:

"It will probably not be contended, but certainly cannot successfully be contended, that the phrase 'to sell' as used in the Act conferred upon the Secretary of the Navy, or the Secretary of the Interior, or both, any authority to receive other than cash for the royalty oils."

But, if their previous contention was correct, their own objection was met and disposed of by the very authorities which they themselves had cited.

In the Law of June, 1920, there is no provision limiting the right to sell to cases where the consideration was payable in cash.

If such a limitation existed, it must therefore be found either in some other statute (which does not exist), or in some judicial decision upholding the theory that a sale is not a sale if the consideration is payable in property other than cash.

But in the effort which the Government's counsel had made to show that in the last mentioned case the

transaction was not an exchange, they would have succeeded, if their arguments are accepted as valid, in establishing exactly the contrary of that for which they must now contend.

In other words, if their authorities have demonstrated that this transaction is a sale because of the reference made in the contract to money values, then the plaintiff has by the same authorities established the power of the Secretary of the Navy to make such a sale, even though the consideration was payable in some other form than that of money.

As we have said at the beginning of this point if the transaction is a sale for the purposes of plaintiff's arguments, it is also a sale within the powers granted by the law of June, 1920.

Let us not be misunderstood upon this point. The transaction was clearly an exchange. There is nothing contained in the decisions relied upon by plaintiff's counsel which tends to shake the law as laid down by this Court in the *Railroad-Telegraph* cases.

But, without departing from the principle for which we contend, it is clear that if for any reason the Court should hold that this transaction presented any of the elements of a sale, then the plaintiff is no nearer success; for the reason that the plaintiff itself would have also proved that such a sale, even though the price is payable in property or rights, was likewise within the power of the Secretary to make.

The statute as to payment of cash into the Treasury only applies if there is cash.

POINT IV.

The Power to Lease Naval Reserve Lands, Conferred by the Act of June 4, 1920, Supports the Contracts as Well as the Leases in Suit.

As we have seen, the Secretary of the Navy directed the making of the contracts of April 25 and December 11, 1922, under the authority conferred by the law of

June 4, 1920, to exchange crude oil and gas from the naval petroleum reserves for fuel oil and other petroleum products desired by the Navy and facilities for the storage and handling thereof. Ample as was the authority to exchange to support these contracts, they are also supportable by the unrestricted authority conferred by the law upon the Secretary of the Navy to lease.

Power of the Secretary of the Navy to lease naval petroleum reserve lands is too clear to admit of doubt. There is no limitation as regards the acreage in the reserves which he may lease, the periods of time for which he may make leases, the method by which or the terms upon which leases may be made. To the discretion of the Secretary of the Navy the Congress committed these things.

The Secretary had power to agree upon the consideration to be received by the Government from any lessee. He might have agreed to receive a money consideration, represented by a lump sum payable at one time, or by a stipulated yearly or monthly rental. Undoubtedly the Secretary could have agreed that the consideration to the Government under any lease should be fuel oil, a refined product of crude, rather than the oil in its crude state at the time of original production.

We submit that it is not doubtful that the Secretary of the Navy could have agreed in any lease entered into by him that as part of the consideration from the lessee to the Government the former should provide storage tanks or other necessary improvements on the reserves.

If the Secretary could have agreed that the Government should have received fuel oil as consideration for a lease, could he not have also agreed that the lessee, as part of that consideration, should provide for the storing and handling of that fuel oil?

And in substance is this not what was done in the

instant case? The lease of December 11th was expressly granted as a consideration of the obligations assumed and services undertaken by the Transport Company under the terms of the contract of that date (R. v. I, 49). The Navy, as an inducement to the Transport Company to provide fuel in storage, render specified services, and agree for a stated period to supply Navy fuel requirements below prevailing market prices, expressly represented that it would agree to lease all of the unleased portion of Reserve No. 1 "if they got enough for it" (R. v. II, 791; 1023; v. III, 1025-6). The negotiations for the contract of December 11th were all conducted on that basis: The Government was desirous of obtaining a certain consideration in petroleum products and storage therefor and services in respect thereof, and was willing in consideration therefor, and in further consideration of the receipt of a percentage of crude oil produced from its lands, to make a lease of the same (R. v. III, 1026).

It is not believed that any serious question would have been made respecting the power of the Secretary of the Navy to make such a lease as that actually made under date of December 11, 1922, were it not for the contract of that date. And it is submitted that as that contract represents but an added consideration to the Government for the lease, its making cannot invalidate the exercise of the Secretary's undoubted power to lease.

What is there in the law to prevent the Secretary of the Navy making the lease of December 11th upon consideration of (1) a percentage of crude oil produced from the leased lands by the lessee; and (2) a specified quantity of fuel oil and other petroleum products in storage? Nothing, we submit. And we further submit that it is perfectly clear that this in substance is what the transaction was. In the judgment of the Secretary of the Navy, exercising the discretion committed to him by law, it was "for the

benefit of the United States'' to lease, upon the above mentioned considerations, the lands in Naval Reserve No. 1 described in the December 11th lease. That judgment is unreviewable. *U. S. ex rel. Ness v. Fisher*, 223 U. S. 683, 56 L. Ed. 610, and cases therein cited.

The existence of an exercised power does not depend upon the clause or phrase in the law which the authorized officer thought gave him the power to do that which he did. If in the law there is found the power to do the thing which the officer did the legality of his act is not subject to successful attack.

What we have thus far said under this point specifically applies to the December 11th lease and contract. In substance it is equally applicable to the April 25th contract and the lease and agreement to lease made in consideration thereof. As a consideration for the agreement of April 25th the Government expressly agreed to lease the lands described in the lease of June 5, 1922, and further conditionally agreed, in the event leases of further lands were determined upon, to lease the same to the Transport Company. Irrespective of form, therefore, this transaction also represents the exercise by the Secretary of the Navy of his power to lease naval petroleum reserve lands upon considerations which in his judgment were "for the benefit of the United States."

The Act of June 4, 1920, "directed" the Secretary of the Navy to "take possession of all properties within the naval petroleum reserves" and empowered him to "develop, use and operate the same in his discretion, directly or by contract, lease or otherwise." Here, we maintain, is ample authority to support the contracts and leases. This is true irrespective of any language in the contracts or documents relating to them.

POINT V.**The Contracts of April 25 and December 11, 1922, Are Not Void Because Providing for the Establishment of a New Naval Fuel Depot Without Express Authority From Congress.**

The Government has urged that even though the Act of June 4, 1920, empowered the Secretary of the Navy to make contracts for the acquisition of fuel oil and storage facilities in which to retain and handle the same, and even though the Secretary of the Navy did exercise that authority in the making of the contracts of April 25 and December 11, 1922, with the Transport Company, nevertheless these contracts are invalid because they provide for the establishment of a new naval fuel depot whereas, Government counsel assert, Congress has expressly declared that the Secretary of the Navy shall have no power to "establish at such places as he may deem necessary, suitable depots for coal and other fuel for the supply of steamships of war."

The argument is based on the fact that formerly there was a statute (Act of August 31, 1842, U. S. R. S. 1552) which provided that the—

"Secretary of the Navy may establish at such places as he may deem necessary suitable depots of coal and other fuel for the supply of steamships of war."

but that the Act of March 4, 1913, provided that—

"Section 1552 of the Revised Statutes of the United States authorizing the Secretary of the Navy to establish at such places as he may deem necessary suitable depots for coal and other fuel for the supply of steamships of war, is hereby repealed."

By this repealing act the former grant of authority was, of course, revoked, and the matter was left, in 1913, without any statutory provisions upon the point.

In other words, instead of finding that counsel for the Government are directing our attention to an

affirmative statute containing specific provisions and conditions, we find that they are directing our attention to a situation where no statute at all existed prior to the passage of the law of June 4, 1920.

So far as the element of "public policy" is concerned, which brought about the repeal of the former act, we are left in no doubt, because the report of the House Committee on Naval Affairs (House Report 62nd Congress, 3rd Session) criticized the former statute because it had authorized the Secretary of the Navy to establish coal depots without the supervision of Congress as to *where* the depots were to be located.

The argument overlooks (1) the fact that the contracts in question neither intended to nor did provide for the establishment of any new fuel depot or station for the Navy; and (2) the authority of the Secretary of the Navy under the Act of June 4, 1920.

(1) As to the facts:

No new fuel depot was established at Pearl Harbor by either of the contracts in question.

At the bottom of all of the arguments of the Government counsel lies the total misapprehension of the facts upon this point. For unless what was done amounted to the establishment of a new fuel depot, then the entire point, whether based upon "public policy," "public statutes" or absence of public statutes, is of no validity whatsoever.

(At this point let us note, once and for all, that the word "depot" and the word "station" have exactly the same meaning.

For, whereas in the law itself which was repealed the words "fuel depot" are used, yet in the report of the Committee which recommends its repeal, after speaking of "coal depots" the same installations are immediately afterwards referred to as "coaling stations" [House Report, 62nd Congress, 3rd Session]).

1. The Pearl Harbor Naval Station first came into existence pursuant to the Navy Appropriation Act of March 3, 1901, for the acquisition of land at that point.

2. For the fiscal year ending June 30, 1909, an appropriation was provided for the building of the Naval Station at that place including the erection of coal sheds; and later facilities were further provided for by the Act of August 22, 1912, making a special appropriation for that purpose and authorizing the Secretary of the Navy to expend out of appropriations made in the Act as much as might be necessary for a coaling station and fuel station. The first contracts for tankage for Navy fuel oil supply at Pearl Harbor were let on August 14, 1912.

Hence 1909 was the year when this fuel depot was established.

3. The Act of March 4, 1913, appropriated funds necessary for the completion of the coaling station.

4. Thereupon a fuel oil plant was erected at this depot.

5. Reference to plaintiff's Exhibit 131 (R. v. III, 1206) will show near the left-hand corner, as part of the fuel depot station at Pearl Harbor, the location of a group of "fuel oil tanks," nine of which were "formerly on the property" prior to the making of either of the contracts in suit (R. v. II, 542). "The area which was selected for the first group of tanks, under the April 25th contract," was "adjacent to the old group" (ib.), and it was only because of the insufficiency of that particular area that space in another part of the same Navy Yard was used for the additional tanks provided for under the December 11th contract (ib. 542-3). All of the facilities constructed under the two contracts in question were built upon the same tract of land that had long been owned by the United States and upon other portions of which the then existing fuel plant had theretofore been erected (ib. 558-9). A direct physical relationship and connection was even established between the new fuel oil tanks and equipment and the pre-existing fuel oil tanks and equipment. The new pipeline facilities from the new wharf built under these

contracts were so built as to serve both the old and the new group of tanks (R. v. II, 543; v. III, 1206). All this is plaintiff's testimony.

Moreover, by plaintiff's Exhibit No. 165 (R. v. II, 614-5) it is shown that prior to the acquisition of one barrel of fuel oil or storage facilities therefor at Pearl Harbor under defendants' contracts, the Navy had in storage at that station 426,000 barrels of fuel oil, counted as part of the total quantity of reserve fuel oil required under the Navy's plan to be kept there (see page 615, v. II, showing quantity "present *storage fuel*" before quantity to be provided under April 25th contract and to be provided under subsequent arrangements).

Also a reference to the Secretary of the Navy's letter of November 29, 1922, will show that he states that the Navy needs for storage of fuel oil and other petroleum products at Pearl Harbor involve a considerable extension of filled storage beyond that *existing* or provided for in the contract with the Transport Company dated April 25, 1922 (R. v. II, 616).

Thus clearly the record made by the plaintiff discloses to this Court, what from appropriation bills would in any event be judicially known, that there existed prior to the year 1922 a Navy fuel oil station or depot at Pearl Harbor; that there was a large quantity of fuel oil in storage existing at the station therefore established, and that as a matter of fact these contracts only provided for an enlargement of an existing fuel depot and not the establishment of a new one.

But it is urged that Congress had not specifically authorized facilities for reserve fuel rather than for fuel for current use and it is argued that this has some bearing in view of the fact that it was the intention of the Secretary of the Navy that the additional facilities to be provided under the Transport Company's contracts should be for fuel to be held in reserve.

It is submitted that the intention of the Secretary of the Navy as regards the time in which the oil put in the tanks might be used is wholly immaterial to the validity of these contracts.

Whatever his intention was, the fact remains that the plant was not erected at any new place—that it was built upon land owned for years by the United States, and that it was an addition to the fuel depot which had been established by the United States pursuant to the approval of Congress as far back as 1909.

Nor is it material whether the new plant could be operated as a separate unit; for whether operated separately or jointly with existing facilities, it was nothing more nor less than an amplification of a fuel depot previously established.

There is no such thing as a "reserve" storage tank as distinguished from a current use storage tank. A fuel oil tank is a fuel oil tank, and it will be built upon the same specifications and will contain the same quality of material whether or not it is mentally labeled by the Secretary of the Navy as a "reserve" or a "current" use tank. No labels, even if they existed, would be conclusive. Any fuel oil tank could instantly be utilized for current use instead of reserve use, and vice versa, if the Navy necessity should so demand. Any tank for the storage of royalty oils could always be used for fuel oil and could be changed from one purpose to the other from time to time as desired.

If these additional tanks of precisely the same size and specifications had been erected by the Secretary at the same place, with the intention of using them for current fuel purposes, Government counsel could hardly be heard to argue that the construction of such facilities were against "public policy."

And the only difference between this last supposition and the facts of the case at bar is a difference in intention—in mental impression or attitude of the Secretary of the Navy, not affecting place, location or specifica-

tions, and which attitude could instantly be changed by him at any time.

As there is no basis for the premise upon which is built the argument that the contracts are void because they provide for the establishment of a fuel depot at a place not selected by Congress for such purpose, the possession by the Secretary of the Navy of authority under the provisions of the Act of June 4, 1920, to store oil wherever in his discretion it would be to the interests of the United States so to do is of secondary importance in this connection. However, we proceed to show the existence of that authority.

(2). As to the law: The Government's legal argument relating to this point is, in the first instance, based upon complete disregard of the statute of June 4, 1920.

The Government's theory is that the repeal of the old statute allowing the Secretary to establish new fuel depots, was the last legislative word upon this subject.

On this theory they insist that the sweeping and general provisions of the 1920 law must always be construed as so limited as to deprive the Secretary of the Navy of the power to build storage tanks.

But the fact is that Congress not only could legislate again upon this topic, but did legislate in the act of June 4, 1920, in such a manner as to give the Secretary of the Navy absolute power to provide for the construction of such storage tanks as he might see fit, whether these were constructed in connection with the depot already established or at a new depot, and whether such construction constituted a separate and distinct unit or not, and that he might thus provide for the storage of fuel petroleum products received in exchange for royalty crude oil—provide for such storage, either for current supply purposes or for reserve supply purposes—provide for it at such places and to such an extent as he in his discretion thought best for the interests of the United States and

of its Navy—and liquidate the cost of such facilities through the delivery of such portion of the royalty oil as he saw fit.

If this is considered as contrary to the policy of 1913, then it overrules that policy.

In making this statement, we are not overlooking the point that what he actually did in this case was, not the establishment of a new fuel depot, but the creation of additional fuel storage facilities at an existing fuel depot where facilities inadequate for the storage purposes he had in view, already existed.

Before proceeding to our next point let us observe that if these new tanks, built as they were as an addition to an existing fuel depot, could not have been constructed without the prior express approval of Congress as to the location, then the Secretary of the Navy could not even have used any part of the \$500,000 general appropriation contained in the Act of June 4, 1920, for the construction of a storage tank at any place whatsoever—whether for reserve purposes or current purposes, and whether at a new location or in connection with an existing fuel depot, unless Congress had passed a subsequent act approving the particular location for the particular tank.

In other words, this particular point does not depend upon the question as to whether the new proposed tanks were built under an exchange contract or by the use of a new general cash appropriation, for the “public policy,” if it existed, as claimed by counsel, had to do with the place—with the location of every tank added to any existing tank installation—and would apply equally even though the construction were to be accomplished by the use of funds theretofore appropriated, the use of which was to be in the discretion of the Secretary of the Navy.

The law of June 4, 1920, permits of no such interpretation.

POINT VI.**The Contracts of April 25 and December 11, 1922, Were not Invalidated by Reason of Any Lack of Public Advertisement.**

This was so held by the District Court.

Judge Kennedy reached the same conclusion in the *Mammoth* case (5 Fed. 2nd at p. 352).

The Circuit Court of Appeals disagreed with the opinion of the District Court upon this point (*R. v. III*, 1505), holding that this law did not "repeal" Section 3709 U. S. R. S.—

"which makes competitive bidding and advertising indispensable to the making of all such contracts."

In opposition to this conclusion, we ask the Court to note:

A. That neither Sec. 3709 U. S. R. S. nor any other general law of the United States provides, or ever provided, that competitive bidding or public advertisement should take place in cases of acquisition of property through exchange contracts.

The only statutes which our adversaries have cited or can cite in support of their contention, are those relating to purchases and contracts for supplies and services. The term "contracts" manifestly refers to "executory contracts" of purchase, as distinguished from spot purchases.

Nor are there any general statutes which purport to require public advertisements as to sales.

None of the statutes has anything to do with exchanges, which are covered by entirely different rules, and which from their very nature, not involving cash transactions, would not usually be the subject of competitive bidding. If all exchanges were covered by this statute, then contracts involving the exchanging of two specific parcels of real estate would require public advertisement—which is absurd.

B. In the absence of express statutory requirement,

no competitive bidding is necessary in connection with governmental contracts.

"It is well established that, in the absence of charter or statutory requirement, municipal contracts need not be let under competitive bidding. *McQuillin on Municipal Corporations*, Sec. 1186, page 2634; *Elliott v. Mpls.*, 59 Minn., 111, 60 N. W., 1081; *Middle-Valley Trap Rock, etc. Co. v. Board of Freeholders*, 70 N. J. L., 625, 57 Atl., 258; affirmed in 71 N. J. L., 333, 60 Atl., 358, *Yarnold v. Lawrence*, 15 Kan., 125; *Augusta v. McKibben*, 22 Ky. Law Rep., 1224, 60 S. W., 291; *Dillingham v. Spartanburg*, 75 S. C., 549, 56 S. E., 381; *Scheffbauer v. Kearney Tp.*, 57 N. J. L., 588, 31 Atl., 454; *Fitzgerald v. Walker*, 55 Ark., 148, 17 S. W., 702."

Price v. City of Fargo (N. D.), 139 N. W., 1054;
Crowder v. Sullivan (Ind.), 28 N. E., 94.

C. The primary purpose of these contracts was the acquisition of fuel oil for the Navy.

Even if the contracts in question are construed as being purchase contracts and not exchange contracts, it has been the express statutory law since 1850 that the Secretary of the Navy may purchase fuel without the necessity of competitive bidding.

The Act of September 28, 1850, Ch. 80, Stat. L. 513, U. S. R. S., Sec. 3728, is as follows:

"In purchasing fuel for the Navy or for Naval Stations and Yards the Secretary of the Navy shall have power to discriminate and purchase, in such manner as he may deem proper, that kind of fuel which is best adapted for the purpose for which it is to be used."

D. The Act of June 4, 1920, which was a comprehensive act intended to cover the entire subject of the Naval Reserves, vested in the Secretary of the Navy ample discretion to enter into contracts pursuant to such methods as seemed to him best.

In other words the entire manner as well as matter of the administration of the Naval Reserves, both in substance and in detail, was confided to his discretion—

and this rule applies even though the contracts in question, instead of being exchange contracts, as they were, were construed as being contracts of purchase and sale.

His discretion was of the broadest conceivable nature.

It was restricted by no limitations. It was not hampered by any compulsory choice of methods.

It was not hindered by any statutory conditions.

It was not affected by any other statutory limitations, for the subject matter covered by this special enactment had never been covered before by any previous legislation; and the statute in question was intended to furnish a complete scheme of law for the first time in the history of the United States, covering all matters connected with the administration of the Naval Reserves. The Secretary's only mandate was to do whatever he might do in such a way as to be, in his opinion, "for the benefit of the United States."

And being vested with this wide and ample discretion, by virtue of the special statute, designed for the first time, to cover the entire subject matter, it is well settled that this special statute contains the only measure of his authority, and that general enactments contained in prior laws, even if they might be otherwise applicable to similar situations, have no bearing in such a case.

In *Fowler v. United States*, 3 Ct. Cl. 43, an appropriation was made to construct a building, such appropriation to be expended under the direction of the Secretary of the Interior.

The Secretary made certain contracts without advertising for competitive bids.

It was held that this matter being especially confided to the judgment and discretion of the Secretary of the Interior, was not subject to the provisions of the general law:

"A majority holds that the act directing this work to be done and making an appropriation for

its execution did not require an advertisement in the newspapers. We think that Secretary Usher by virtue of the power conferred in the act had power to make the contract with Fowler in the manner in which he did."

In the case of the *Snow & Ice Transportation Company*, 22 Op. Atty. Gen., 437, Congress passed a law authorizing the Secretary of War to fit out an expedition for the relief of persons who had gone out to the Arctic Regions, and to use the Army of the United States in aid of such expedition.

The Secretary settled a damage claim for unliquidated damages, although the general law restricted him to the payment of liquidated claims. It was held that such a settlement was within the powers incidental to the general power granted him.

The Attorney General said at page 442:

"Everything pertaining to the expedition was committed to the discretion of the Secretary of War.

It is difficult to see that within the general object of the expedition and the amount appropriated, he did not have all the power and discretion which the Government itself had or could exercise. . . . He had **all the power there was or that** could be conferred; there was no limit to it save to keep within the general object of the expedition, . . . because the statute has not restricted him to the payment of liquidated claims, he is clearly not so restricted, and this discretion thus given by the statute is one which no Court can interfere with or control."

Where an appropriation for national defense was "to be expended in the discretion of the President," the general law as to the necessity of written contracts did not apply, and an oral contract was binding.

In re Claim of Leach, 9 Dec. Comp. Treas. 457 (1903).

In the Act of 1902 an appropriation of \$100,000 was made for unforeseen contingencies for the mainte-

nance of the Navy "to be expended at the discretion of the President."

It was held by the Comptroller of the Treasury that this discretionary power allowed him to expend the money under oral contracts and that the general provisions of Section 3744, requiring that all contracts should be reduced to writing, and signed at the end thereof, did not apply.

9 Dec. Comp. Treas., 805, citing *Leach* claim, *supra*, *Snow & Ice Co.* opinion, *supra*, and *Pacific Steam Whaling Co.* case, *infra*.

In *Pacific Steam Whaling Co. v. United States*, 36 Court of Claims, 105, a statute authorized the Secretary of War to relieve the sufferings of the people of Alaska.

The Secretary made an oral contract not in accordance with R. S. 3744.

Held that this was a special matter in which the Secretary had power and that it was not covered by the general law.

In re Claim of Iowa for reimbursement of expense in preventing small-pox among the Indians, 9 Dec. Comp. Treas., 656, a fund was appropriated to be expended in the discretion of the Secretary of the Interior.

He reimbursed the State of Iowa for expenses which were made voluntarily by the State, but which the Secretary could have contracted for before they were made. Held this was within his discretionary power.

In *United States v. Mathews*, 173 U. S., 381, a special act was passed appropriating a sum of money to be expended under the direction of the Attorney General for the prosecution and detection of crime against the United States.

At that time there was a general law that no civil officer of the Government should receive any compensation from the Treasury beyond his compensation allowed by law.

A United States deputy marshal claimed a reward offered by the Attorney General payable out of this particular fund.

The Court held that inasmuch as the offer of the Attorney General had not excluded officers of the Government, there was no reason why the deputy marshal should not recover the reward and that the general statute preventing extra compensation did not apply.

"As the reward was sanctioned by the statute making the appropriation and was embraced within the offer of the Attorney General, it clearly, under any view of the case, was removed from the provision of the statute in question. The appropriation act being a special and later enactment operated necessarily to engraft upon the prior and general statute, an exception to the extent of the power conferred on the Attorney General and necessary for the exercise of the discretion lodged in him for the purpose of carrying out the provisions of the later and special act (page 387).

"The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together, one as the general law of the land, the other as the law of the particular case."

State v. Stoll, 17 Wall., 425, page 436.

In *Walla Walla v. The Walla Walla Water Co.*, 172 U. S., 1, there was a general statute requiring an election to ratify contracts made by cities for water supply.

A city charter provided that it might enter into a contract for a water supply. There was no express provision for an election, although the charter did provide for such an election as a condition of the erection of water works by the city. The Court held:

"While this special act is silent with reference to the ratification of contracts to supply water, we think the maxim '*expressio unis est exclusio alterius*' is applicable and that it was clearly the intention of the legislature to supersede the gen-

eral law in this particular, leaving the general law to stand, where it is proposed that the city shall erect and maintain water works of its own." Page 22.

See *New York Central & Hudson Railroad v. United States*, 21 Court of Claims, 368;
See *Cobb v. The United States*, 7 Court of Claims, 470, to same effect.

It will be noticed that in none of the foregoing authorities was there any necessary inconsistency between the special act and the general laws which were held inapplicable.

If any inconsistency existed, of course the special statute alone would apply; but the general principle applies where the special statute is clearly intended to cover the entire subject matter, even though there is no inconsistency.

This Court alludes to—

"The well-settled rule that general and specific provisions and apparent contradictions, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general."

Townsend v. Little, 109 U. S., 504;

Lessee of French v. Spencer, 21 How. at p. 237;

Kepner v. U. S., 195 U. S., at p. 125;

Rodgers v. U. S., 185 U. S. at p. 87;

Hemmer v. U. S., 204 Fed. at p. 906;

Jackson v. Graves (C. C. A., 5th Cir. 1910), 238 Fed., 117;

U. S. v. Chase, 135 U. S., 255;

Priddy v. Thompson, 204 Fed., 955.

Anchor Oil Co. v. Gray, 257 Fed., 283.

In view of constant reiteration by counsel for the plaintiff of the thought that our contention would repeal the general law which otherwise might require public advertisement, we deem it proper to repeat that none of these cases holds that the effect of the special statute is to repeal the general law previously in existence, but that it simply operates to create an exception to that law.

The rule which has been laid down in numerous decisions in slightly varying language is nowhere better stated than in the decision of the Circuit Court of Appeals of the 2nd Circuit in *Magone v. King*, 51 Fed., 525, 526, in the following words of Circuit Judge Wallace:

“The settled rule of statutory construction is that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and general provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable.”

Before leaving this point we again emphasize the fact that the Secretary's discretion extends to questions of detail as well as to those of greater importance. The sweeping and inclusive nature of the language used gives him all the power that can be given—all the power there was—as to the entire subject matter, not only substance but methods as well. Had a contrary intention existed—if Congress had intended to limit the inclusive provisions of the act in any particular—it would have so provided in the law itself, as was done in several of the sections of the Leasing Act of February, 1920, and in the Fortifications Appropriation Act of June 25, 1906, ch. 3540, 8 Fed. Stat. Ann., 395:

“It shall be the duty of the Secretary of War to apply the money herein and hereafter appropriated for fortifications and other works of defense, in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals, in such manner and form as the Secretary of War shall prescribe; and such contracts shall be made with the lowest responsible bidders, accompanied by such securities as the Secretary of War shall require, conditioned for the faithful prosecution and completion of the work according to such contract. (34 Stat. L., 463.)”

If Sec. 3709 applied to all contracts, whether or not forming part of a project the manner for the execution of which was confided to the discretion of the President or a particular head of department, then there was no need of expressly providing in the above quoted fortification act that where the Secretary of War determined to do any part of the work by contract he should advertise for bids. The inference to be drawn from the fact that such a provision was included in that act is that Congress itself did not consider that where discretion in the expenditure of funds or the execution of a project was vested by it in the head of a department, he would be controlled by general legislation with reference to advertising unless in the special act they specifically so provided.

E. The cases upon which the Government relies are not applicable.

In *U. S. v. Envelope Co.* (249 U. S., 313), there was no pretense of a special law taking that supply contract out of the operation of the general law.

The case of *U. S. v. Ellicott* (223 U. S., 524), upon which much reliance is placed by the Government, is submitted to be an authority directly in our favor.

That case arose under the Isthmian Canal Act which directed the President of the United States to cause the canal to be constructed, and to appoint a Commission. It then provided:

“Said Commission shall in all matters be subject to the direction and control of the President.”

He thereafter (April 1, 1905, p. 483, Proceedings of Isthmian Commission) ordered the Commission to award contracts on advertised proposals, and this order was followed by the adoption of resolutions (ib., p. 492) by the Commission embodying the language of the order.

And the decision that was made was not in a case where the general law applied, but in a special case covered by a special statute, where the discretion was

vested in an executive officer, and where that executive officer, having full power, had ordered that competitive bidding should take place.

If the President had ordered that no competitive bidding should take place, can there be any doubt but that under this special act, he would have had full power to do so?

The case of *Great Northern R. R. Co. v. U. S.* (108 U. S., 452) was not a case involving a comprehensive statute governing a particular situation.

The case of *Erie Coal & Coke Co. v. U. S.* (266 U. S. 518) was a case where the special discretion vested in the Secretary of War was not intended to, and did not, cover the matter to which the general law applies.

The case of *U. S. v. Noce* (268 U. S., 613) is rather against, than in favor of, the Government's contention, since in that case the Court refused to consider a later general statute as controlling, and held that the previous special statute covered the particular situation under discussion. Each statute was recognized as having its special scope and application in its particular field.

POINT VII.

The Secretary of the Navy Was Not Required to Resort to Competitive Bidding As a Condition Precedent to the Making of the Leases of June 5 and December 11, 1922.

The District Judge so ruled.

It was so held by District Judge Kennedy in the *Teapot Dome* lease case, 5 Fed. (2d) 330.

Judge Shepard also so held in *United States v. Belridge Oil Co.*, decided July 17, 1925, D. C. S. D., Cal., unreported.

The Circuit Court of Appeals, Ninth Circuit on July 12, 1926, affirmed Judge Shepard's decision in the *Belridge* case and held that the provision of Section 3709, R. S. U. S., requiring that contracts for supplies and services shall be made by advertising a sufficient

time previously for proposals, "of course, can have no application" to a lease under the Act of June 4, 1920, of land in the naval reserves.

In the case at bar the Circuit Court of Appeals made no reference to this point.

It is not only clear, as the Circuit Court of Appeals held in the *Belridge* case, *supra*, that the provisions of Sec. 3709, R. S. U. S., do not require advertising for proposals for leases of Government property, but there is not and never has been any law so requiring.

"As has been stated, the effect of this statute is to require advertisement for bids in all purchases or contracts for supplies or services by the Federal Government, but there are certain well defined exceptions, as follows: * * * When the subject of the proposed contract is neither services nor supplies, for instance, lease for the rental of property."

Shealey on Law of Government Contracts, page 159.

The Act of June 4, 1920, contains no provision requiring advertising or competitive bidding in such cases.

POINT VIII.

The Secretary of the Navy As Matter of Fact Exercised, in Connection with the Contracts and Leases Involved in This Suit, the Power Conferred Upon Him By the Act of June 4, 1920.

No points to support the claim that these contracts and leases were executed without legal authority have been presented in addition to those hereinbefore discussed. But it is urged by plaintiff's counsel and was held by the District Court that as matter of fact these contracts and leases are voidable, even though authority of law existed for them, because—

1. The Secretary of the Navy, the only officer authorized by law, did not make or authorize them;

2. The Secretary of the Interior, who was not so authorized, did make them and did so pursuant to a conspiracy to defraud to which he was a party and be-

cause he was influenced thereto by a financial transaction he had with defendants' chief executive officer;

3. In any event, even if the two claims above stated are not sustained, these contracts should be set aside because they contain delegations from the Secretary of the Navy to the Secretary of the Interior of discretionary functions which only the Secretary of the Navy was authorized to perform and which he could not lawfully delegate.

Of these in the foregoing order.

(1) As we have seen, the District Court concluded that the Secretary of the Navy had ample power to make contracts and leases of the character here involved. That Court held these contracts to be true exchange contracts within the Secretary of the Navy's power to exchange oil produced from naval lands; that the Secretary of the Navy under the power to "exchange" and the power to "store" had a right to exchange crude oil belonging to the Navy for fuel oil and the facilities necessary for the storage thereof and incident to the use thereof. Specifically the District Court concluded that except for delegations in the contracts of functions to be performed by the Secretary of the Interior, and for his conclusion that the evidence showed fraud (with which it was not charged, argued or held that the Secretary of the Navy or any officer of his Department had the slightest connection), these contracts and leases would have constituted valid exercises of the lawful power of the Secretary of the Navy (R. v. III, 1390-1).

In view of the legal conclusions which he had reached, if the District Court found that the Secretary of the Navy had in fact made the contracts which in law he had the power to make, the necessity of sustaining those contracts was unescapable. But the District Court found that the Secretary of the Navy did not in fact really make the contracts which in law he was authorized to make.

The Circuit Court of Appeals did not approve or even discuss this finding of fact. It was the outstanding disputed question of fact, the primary contested finding. Assuming, what we shall undertake to show the evidence disclosed to a demonstration, that the Secretary of the Navy did in fact make these contracts and leases the Circuit Court of Appeals found that there was no authority in law for their making.

As a preliminary to an examination of the uncontradicted documentary and oral evidence on this question of fact we respectfully submit, in view of the position taken by the Circuit Court of Appeals, the non-applicability of the "two-court rule" laid down by this Court as regards a review here of findings of fact supported by evidence. It is submitted that this rule cannot be applied where, as here, the appellate court not only held that the disputed facts were unimportant in view of its conclusions upon the law applicable to the case, but also clearly recognized that the evidence was insufficient to support contested findings of fact (R. v. III, 1499).

Aside from the foregoing, this Court will review findings of fact and disregard them unless they are supported by evidence—for the Court has repeatedly held that the two-court rule applies only when there is evidence sufficient to support the contested findings:

"Lastly, complaint is made of the findings of fact sustaining the defense of adverse possession and laches. The courts below concurred in these findings and explained them in considered opinions. The record shows with certainty that the findings had very substantial support in the evidence. This Court accepts concurrent findings with such support. (Citations.)"

Del Pozo v. Wilson Cypress Co., 269 U. S. 82; 70 L. Ed. 72.

"The questions * * * are questions of fact. * * * In the present case both the district court and the circuit court of appeals have found, from the evidence, * * * that the land in dispute is

east of that line * * *. Under the well-settled rule these concurrent findings on questions of fact will be accepted by this court unless clear error is shown. (Citations.) An examination of the evidence—which need not be recited here—discloses no such error; and, on the contrary, leads us to the conclusion that the findings of the lower courts are in accordance with the greater weight of the testimony.”

United States v. State Investment Co., 264 U. S. 206, 211, 68 L. Ed. 639, 642.

Norton v. Larney, 266 U. S. 511, 518, 69 L. Ed. 413, 417.

Second Russian Ins. Co. v. Miller, 268 U. S. 552, 557, 69 L. Ed. 1088, 1090-1.

Assuming the legal power of the Secretary of the Navy, which we have hereinbefore fully discussed, then if he in fact exercised it, the instruments here in suit are unassailable because, as regards Secretary Denby, there is no allegation in the bill, there is no evidence in the record, there was no claim in the courts below and there can be none here, that he was party to any conspiracy, to the commission of any fraud, that he was bribed or that on the subject of these contracts there was any misrepresentation made to him, any deceit practiced upon him, or any improper influence exerted over him, by Secretary Fall, on the one hand, or by any person connected with these defendants, on the other. Indeed, before we proceed further, let it be said that this record is bare of any representations of any kind made by Secretary Fall to Secretary Denby in connection with or for the purpose of bringing about the making of these contracts. And this statement is true as regards any and every officer of the Navy Department who had any connection with, or performed any duty in relation to, these contracts or the departmental plans, decisions or negotiations which brought about their making.

We turn now to what the District Court found and what the indisputable record shows on the point as regards what Secretary Denby in fact did:

The District Judge's thirteenth finding of fact is—

"13. That Edwin Denby, Secretary of the Navy, was passive throughout all of the negotiations that eventuated in the contracts and leases in suit, and took no active part in said negotiations, and that he signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, under misapprehension and without full knowledge of the contents of said documents." (R. v. III, 1398.)

In the course of his opinion, the District Judge, referring to Secretary Denby said:

"His participation in the making and executing of the agreements in suit was perfunctory, passive and formal." (ib. 1272.)

Again, in the opinion of the District Court, it is stated that—

"Secretary Denby, as I have previously stated, showed early in the negotiations and throughout a disinclination and unwillingness to participate in the negotiations in any active way." (ib. 1281.)

Once more the Court says:

"It is very doubtful whether Secretary Denby was cognizant of the terms of the contracts. It is certain that he was induced to sign them under a misapprehension. He relied entirely upon Admiral Robison for information concerning the contracts and leases and it is shown that he signed them under the belief that they were necessary as protective measures against drainage on the reserves." (ib. 1348.)

And specifically with respect to the contract of December 11, 1922, the District Court says:

"Secretary Denby personally took no part in the negotiations and never read the contract thoroughly. He relied entirely upon Admiral Robison. He had never met Mr. Doheny until the time that he signed the contract on December 11, 1922, when Admiral Robison introduced Mr. Doheny to him." (ib. 1364.)

Does the evidence support those findings?

Answering that question we shall present to the Court—

First. All evidence showing the knowledge of the Secretary of the Navy of the contents of the documents signed by him; and

Second. All the evidence relating to the participation of the Secretary of the Navy in the making of the contracts represented by those documents.

Did Secretary Denby personally sign the documents?

If we find that he did, did he have knowledge of the contents thereof or was he without such knowledge?

Before turning to the record for the answers to these questions, and confining ourselves now to the act of signing with or without knowledge, deferring for later discussion everything that preceded that act, let us again emphasize before this Court what the District Court said on this specific point, our justification for the repetition being that it will be found that upon this all-important matter the finding and the opinion of the District Court was just as much justified (but no more) by the evidence in this case as any other finding or opinion on any important matter of fact was.

The District Judge found, and said he found from the evidence, that Secretary Denby "signed the contracts of April 25, 1922, and December 11, 1922, and the lease of December 11, 1922, and the letter of April 25, 1922, * * * without full knowledge of the contents of said documents." (R. v. III, 1398.)

The Judge further said:

"It is very doubtful whether Secretary Denby was cognizant of the terms of the contracts." (ib. 1348.)

Specifically as to the December 11th contract the Judge said:

"Secretary Denby * * * never read the contract thoroughly." (ib. 1364).

Now let us turn to the record on this subject; not to part of the record, but to all of it:

WHO SIGNED DOCUMENTS.

The record at page 1194 contains the following:

"The authenticity of the documents received in evidence in this case was admitted by the solicitors for all of the parties hereto. It was further stipulated that all signatures appearing on any of said documents were the genuine signatures of the persons whose names appear as signers, made in each instance with his own hand, there being no names signed by, or per, any other persons."

SECRETARY DENBY'S SIGNATURE.

The first of the four documents mentioned in the trial court's thirteenth finding is found at page 36 and is signed:

"The United States of America,
by Edward C. Finney,
Acting Secretary of the Interior,
by Edwin Denby,
Secretary of the Navy,

For and on Behalf of the United States of America."

That is the contract of April 25, 1922.

The second, being the contract of December 11, 1922, is signed as shown on page 50, thus:

"The United States of America,
by Albert B. Fall,
Secretary of the Interior.
by Edwin Denby,
Secretary of Navy."

The third, being the lease of December 11, 1922, is on page 65, similarly signed.

The fourth, being the letter of April 25, 1922, authorizing the document which became the lease of June 5, 1922, we find on page 68, signed:

"Edward C. Finney,
Acting Secretary.
Edwin Denby,
Secretary of the Navy."

THE LEGAL PRINCIPLES.

If we had no more than this we would have in our behalf the application of that well settled principle that one who signs a document is presumed to have knowledge of its contents.

But even more directly applicable here is the settled principle that there is always a presumption that official acts or duties have been properly performed. This Court in *Ross v. Stewart*, 227 U. S. 530, said at page 535:

"All reasonable presumptions must be indulged in support of the action of the officers to whom the law entrusted the proceedings resulting in the patent, and unless it clearly appears that they committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they themselves were chargeable with fraudulent practices, * * * their action must stand. *Shepley v. Cowan*, 91 U. S. 330, 340; *Marquez v. Frisbie*, 101 U. S. 473; *Quinby v. Conlan*, 104 U. S. 420, 426; *Baldwin v. Starks*, 107 U. S. 463; *Lee v. Johnson*, 116 U. S. 48; *Sanford v. Sanford*, 139 U. S. 642."

"The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et sollemniter esse acta, donec probetur contrarium.*'"

Cincinnati & Texas Pac. Ry. v. Rankin, 241 U. S. 319, 327.

Literally hundreds of decided cases in this Court, lower Federal courts, and the courts of practically every State in the Union, have announced this principle. See a multitude of citations, 22 C. J. 130-133.

As early as *Delassus v. United States*, 9 Pet. 117, Chief Justice Marshall said:

"A grant or a concession made by that officer who is by law authorized to make it carries with it *prima facie* evidence that it is within his power."

And in *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, the Court said:

“It is a presumption of law that all public officers, and especially such high functionaries, perform their proper official duties until the contrary is proved.”

Mr. Justice Story in *Bank of United States v. Dandridge*, 12 Wheat. 65, 6 L. Ed. 552, stated that the law “presumes that every man, in his private and official character, does his duty, until the contrary is proved.” And Mr. Justice Moody in *Quinlan v. Green Co.*, 205 U. S. 410, 1. c. 422, referred to the “broader presumption that officers charged with the performance of a public duty perform it correctly.”

THE EVIDENCE AS TO SECRETARY DENBY'S KNOWLEDGE.

But in this case we do not rely simply on well settled presumptions for there is evidence on the subject of Secretary Denby's knowledge or lack of knowledge of the contents and the purpose of the documents he signed. There is affirmative evidence on that subject, evidence which was not contradicted or attempted to be contradicted; evidence that came from a source unimpeached and unimpeachable; evidence that came from a source commended for good faith and honesty and honorableness and patriotism by both counsel for the United States and the District Court.

We have said that we would direct the Court's attention to *all* of the evidence on the subject now being discussed and we now proceed so to do.

SIGNING OF APRIL 25 CONTRACT.

As to the contract of April 25, 1922, the draft thereof was made by a Mr. McWilliamson, an attorney connected with the office of Solicitor for the Interior Department. Admiral Robison got the draft of the contract and “Mr. Neagle, the solicitor of the Navy Department, went over the draft with Admiral Robison,

in the latter's office; the" Admiral "had his advice" (R. v. II, 1008).

Then Admiral Robison took the contract—

"to Secretary Denby; the Admiral and Secretary Denby read over that draft, made several changes in it which were made by both of them together, and which consisted of about a half dozen changes in phraseology; this was done by taking a pencil and scratching out a phrase, or inserting a phrase, as the case might be; there were no material changes made * * * . After Secretary Denby and the witness went over this draft and indicated on it changes in the phraseology, as above testified to, Secretary Denby said, respecting the draft of the contract, 'It is all right; go ahead and put it through,' or words to that effect." (ib. 1008.)

The final draft of the contract being ready Admiral Robison—

"took the final draft of the contract to Secretary Denby, and at the same time took to the Secretary the letter of April 25, 1922 * * * ; they were both accomplished at the same time; * * * Secretary Denby did not read the contract over *again*, when it was presented by Admiral Robison to the Secretary for his signature; the Secretary asked the witness whether it included the changes that they had made, and witness pointed out to Secretary Denby the places where those changes had been made, and showed him that it was exactly what he wanted, and assured him that there were no other changes included therein; witness had gone over the contract in detail before presenting it to the Secretary; thereupon, the Secretary signed it." (ib., 1009.)

We ask the Court to bear in mind that we are addressing ourselves now to the mere question whether Secretary Denby knew the contents of the documents. There is no word and no circumstance in this record in conflict with what we have just quoted as regards Mr. Denby's examination of the first contract.

CONTRACT AND LEASE OF DECEMBER 11, 1922.

Let us turn now to the contract of December 11th as to which the District Court not only found that Secretary Denby signed it without full knowledge of its contents, but as regards which that court further said "Secretary Denby * * * never read the contract thoroughly."

All of the evidence in the case on that subject is this:

"As regards the draft of the contract of December 11th, and of the lease bearing the same date, that was drawn up in the Bureau of Mines and was ready, roughly, on December 8th; witness [Admiral Robison] got a copy of it on the 9th and went over it in detail and at length with the Secretary of the Navy, and passed it over to the Judge Advocate General for study and any necessary revision." (R. v. III, 1038.)

It was stipulated by counsel for the United States and defendants that it was the fact (R. v. II, 696) that—

"On or about December 8, 1922, Admiral J. K. Robison, Chief of the Bureau of Engineering of the Navy, by direction of Edwin Denby, then Secretary of the Navy, referred to the office of the Judge Advocate General of the Navy draft of the contract of December 11, 1922" (ib. 706)

and, the evidence is, the same was considered by the Solicitor and the Judge Advocate General and approved by those officials after making several changes in matters "that appeared to that office to better safeguard the naval interests" (R. v. III, 1039).

Note that the testimony is clear, explicit, undisputed, uncontradicted, that on the 9th of December Secretary Denby and Admiral Robison went over the contract and lease of December 11th "in detail and at length" (ib. 1038).

The contract and lease having been passed upon by the Solicitor and the Judge Advocate General, to whom they were referred by the express direction of Secretary Denby, and having been gone over in de-

tail and at length with Secretary Denby by Admiral Robison, the next facts found in the record respecting them are stated as follows:

“Admiral Robison was present when Mr. Denby executed the contract and lease of December 11, 1922 * * *. When Secretary Denby signed these papers there were present, in addition to Admiral Robison, Mr. Cotter and Mr. Doheny * * *. At the time when the contract and lease * * * were presented to Secretary Denby for signature the Secretary asked the witness whether the papers had in them all the changes that ‘we put in;’ Admiral Robison showed Mr. Denby where they had been included in the final draft ‘as we had directed’ in the Judge Advocate General’s office, showed Mr. Denby that they were all in. The Secretary inquired if there was anything else in the contract except as agreed and Admiral Robison assured him that it was identical with what he had been over with the Admiral in detail. The Secretary said then that it was all ready for signature and he might as well finish the job and he signed it; he glanced over it before signing but didn’t spend the time to read it thoroughly at that time.” (R. v. III, 1040.)

SECRETARY DENBY’S COMMENT AFTER SIGNING.

On December 11, 1922, Edwin Denby signed a contract under which the Transport Company undertook to perform a great construction work, and at the same time he signed a lease to the Petroleum Company of a concededly valuable piece of Government property. Having this in mind, note his remark to Mr. Doheny who had signed these contracts for the companies:

“On this occasion” Admiral Robison ‘introduced Mr. Doheny and Mr. Cotter to Secretary Denby; Mr. Denby and Mr. Doheny said they had never met before; * * * the Secretary said to Mr. Doheny, in substance, ‘You have got a big job to do and you have got a fine piece of property,’ and Mr. Doheny replied ‘We have got what I hope will be a fine piece of property, but we certainly have got a big job to do.’ ” (R. v. III, 1041.)

No one disputes that the job was a big one but it is said that Secretary Denby did not know what he was talking about.

The Government claims that the Petroleum Company got a fine piece of property but it is said that Secretary Denby did not comprehend that fact—although he said it!

And now we have quoted to this Court all that the District Court had upon which to base a finding as regards whether Secretary Denby read the documents he signed and knew what was in them. We repeat—we have quoted all the evidence; there is nothing else, more, or different, in the record on that point.

PERTINENT STATEMENT OF DISTRICT JUDGE KENNEDY.

Referring to a similar contention of the Government made in the *Teapot Dome* case (*U. S. v. Mammoth Oil Co.*, 5 Fed. 2d 330), District Judge Kennedy, at page 344, well said that—

“To hold that it was not Denby’s official act is, it seems to us, little short of branding him as an imbecile.”

INDIRECT EVIDENCE OF KNOWLEDGE.

There are just two other items of testimony indirectly bearing upon the subject of what Secretary Denby knew as regards documents he signed and they are—

1. On October 8, 1921, a letter referring to the naval petroleum reserves had been placed on Secretary Denby’s desk in his correspondence for signature and the Secretary, differing with it, had sent for Admiral Robison and interrogated him regarding its contents and ordered that thereafter naval reserve matters should not be handled by Commander Stuart, an assistant in the Engineering Bureau, but should be handled by Admiral Robison, the Chief of the Bureau, himself (*R. v. II* 954-5).

2. Admiral Robison testified, again without any contradiction (*ib.* 989-90)—

"As regards Secretary Denby's custom with regard to signing letters placed before him, he never let any of them go through without knowing what was in them."

SECRETARY DENBY'S PARTICIPATION IN MAKING THE CONTRACTS.

We next proceed to present to the Court the facts in evidence bearing on the question whether the Secretary of the Navy directed and controlled the making of these contracts, that is to say, whether he exercised the powers conferred upon him by the law governing all naval reserve matters.

It will serve to an understanding of the negotiations leading up to the making of the contracts if we briefly narrate some of the steps which preceded those negotiations.

Edwin Denby became Secretary of the Navy March 4, 1921.

Prior to that time Secretary Daniels had as his representative in charge of naval oil reserve matters Commander Stuart, a subordinate in the Bureau of Engineering in the Navy Department at Washington, who, though a subordinate of that Bureau, was not under the Chief of that Bureau in respect of the oil reserves. The Chief of that Bureau until October, 1921, was Admiral Griffin.

The necessary relation of the functions of the Interior Department under the Act of February 25, 1920, and the Navy Department under the Act of June 4, 1920, brought Commander Stuart, representing the Navy, into contact with Interior Department officials.

The matters which these two departments had to handle in that contact were not carried on smoothly and there were, according to Assistant Secretary of the Interior Finney, a witness for the United States, who had been in the Department thirty years, "antagonism," as well as "duplications" and "divisions of authority," "under the past administration with respect to these matters" (R. v. I, 311).

Secretary Finney so advised Secretary Fall early in the Harding Administration.

In May, 1921, as we have seen, Secretary Denby suggested to President Harding the issuance of the Executive Order. Judge Finney, who had long been a law officer of the Interior Department, gave a written opinion to the effect that under the law such an order was authorized and he made a draft of a proposed order.

After consideration by officials of the Navy Department and Interior Department the order which represented in part the work of the two departments, and was approved as satisfactory by Secretary Denby and Secretary Fall, was taken by Naval Assistant Secretary Roosevelt to President Harding and by the latter signed on May 31, 1921.

It was at that time quite evidently the intention of Secretary Denby to leave to the Interior Department the handling of leases to these lands.

But that was in 1921 and at that time Admiral Robinson had not taken charge as the Navy Secretary's representative of these oil reserves, and we shall see that it is unnecessary to devote more time to either the history or the language of that Executive Order, or to statements made by Secretary Denby, on the one hand, or Secretary Fall, on the other, as regards who would thereafter exercise the authority given by Congress in the making of leases to naval oil reserve lands, because, as we shall hereinafter show, utterly regardless of what were the intentions of Secretary Denby or of Secretary Fall in 1921, the vital question here is what in fact was done in 1922 in respect of the contracts involved in this case. However broad the language of the Executive Order may be considered, whatever may have been the belief at the time it was promulgated as regards the scope of the authority of the Secretary of the Interior under it and the surrender by the Secretary of the Navy of the powers

conferred upon him by Congress, the evidence shows, first, that so far as the only matters here in issue are concerned the Secretary of the Navy directly and through his duly authorized naval representative exercised the powers and discretion conferred upon him by Congress; and, second, that the Executive Order, except for the purpose of enlisting the aid of Interior Department officials in connection with matters which established Bureaus of that Department were better equipped to handle than any others in the Government, became and was utterly immaterial.

ROBISON'S APPOINTMENT.

On October 1, 1921, Captain John K. Robison, then an officer of our Navy for 35 years (R. v. II, 950), was, upon the recommendation of Secretary Denby, appointed, by the President, Engineer-in-Chief of the Navy, Chief of the Bureau of Engineering, with the rank of Rear-Admiral. As we have seen at this time naval reserve matters were being handled in that Bureau by a subordinate thereof independently of the Chief thereof. That anomalous situation had been created before Mr. Denby became Secretary of the Navy.

October 8, 1921, Secretary Denby directed Admiral Robison to himself handle naval petroleum reserve matters thereafter.

On October 18th, at a meeting of the Navy Council, Secretary Denby announced that unless there was objection he would sign an order transferring all fuel oil activities to the Bureau of Engineering. The minutes of this meeting show that there was a discussion on the subject of oil supply but no objection was voiced to the Secretary's proposed action (R. v. III, 1175), and thereupon the orders of the Secretary of the Navy placing Robison in charge, under the Secretary, of naval petroleum reserve matters, were formally issued in writing (ib. 955).

It took Robison a little while to get in full charge but from a period commencing about a month after he was thus designated by Secretary Denby, and regardless, we repeat, of what the language, the intention, the purpose, of anybody in connection with the Executive Order or the functions of the Secretary of the Interior in naval petroleum reserve matters may theretofore have been, the Navy Department had in the person of Robison, acting as we shall see always under the immediate direction and supervision of Secretary Denby, complete domination, direction and control of leases and contracts in respect of the naval reserves.

Robison was an active officer with a strong personality.

The naval interests were his primary concern, the national defense his patriotic hobby.

ADMIRAL ROBISON'S STATUS AND MOTIVES IN THE TRANSACTIONS IN ISSUE.

In view of the actions of Admiral Robison relating to the transactions involved in this case, the functions which he performed for, under and immediately with Secretary Denby, and the purposes and motives by which he was actuated, we digress to present this officer to this Court in language of others:

First, a description of Admiral Robison's official position as regards Navy oil was given by Government counsel in their brief below in these words:

"Admiral Robison * * * the personal representative of the Secretary of the Navy in active charge of naval fuel matters."

Second, he is identified in the record twice by Secretary Denby; once in a letter dated December 14, 1921, received by Acting Secretary of the Interior Finney (R. v. I, 339), in this language:

"I have designated Rear-Admiral J. K. Robison as my representative to handle all details in connection with naval petroleum reserve questions." (ib. 341)

and again, by letter addressed to the Secretary of the Interior, by Secretary Denby, dated November 29, 1922 (regarding plan which eventuated in contract and lease of December 11) in this language:

"I have instructed Rear Admiral J. K. Robison, the Engineer-in-Chief of the Navy, to confer with you in this matter, as my direct representative." (ib. 618.)

Third. Said the District Court:

"Admiral Robison, in acting as aide to Secretary Denby in March, 1921, and later upon being detailed to the Engineering Bureau, manifested an ardent and patriotic desire to construct and supply a reserve oil fuel station at Pearl Harbor, Hawaii, and in general to adopt a program for the establishment and construction of reserve oil fuel stations for the Navy in order to strengthen the national defense." (R. v. III, 1287.)

Again, said Judge McCormick:

"The testimony of Admiral Robison and the circumstances in proof convince me that Admiral Robison had no ulterior motive or mercenary purpose in any of the transactions involved in this case. (ib. 1287.)

Fourth, we quote what counsel for the Government said of this same Admiral Robison, and in respect of similar activities in another petroleum reserve contract transaction, as stated in the opinion of Judge Kennedy in the Teapot Dome case at page 343 of 5 Fed. (2d):

"Counsel for the Government in argument, being asked as to the basis of Admiral Robison's assertive attitude, charged it to super-enthusiasm and zeal for the welfare of that defense arm of the government which he represented."

ADMIRAL ROBISON TAKES CHARGE.

At the time of Robison's appointment in October, 1921, the Navy Department had not definitely determined whether to use oil received by it from the naval

reserves for current purposes or to place it in storage as a reserve for some future national emergency. It is important to keep in mind this point: There is much confusion in the correspondence and other documentary evidence which is clarified by remembering that there were two thoughts on the subject prior to December, 1921. One was that the Navy should use the oil produced from the reserves in its vessels while steaming in manoeuvres and in moving from place to place in 1921 and 1922. The other thought was that the Navy should use the product of reserves to build up a great reserve, the oil to be used on vessels of war when war came. Robison was an advocate of the latter policy.

In October, 1921, as the representative of the Secretary of the Navy Robison conferred with Secretary of the Interior Fall, Director of the Bureau of Mines Bain, and Chief Petroleum Technologist of the Bureau of Mines Ambrose. The result of this conference was the formulation of a letter which Secretary Denby named "the policy letter," dated October 25, 1921, sent by Denby to the Secretary of the Interior. We shall see that so far as these contracts are concerned the "policy" intended when that letter was written was departed from.

There followed some actions in the way of providing for temporary storage of oil until the Navy arranged to transport it to the points at which it was to be used, matters with which the defendant companies were in no way concerned. In conference on these subjects Admiral Robison and Secretary Fall discussed the question of the cost of tankage for oil storage, Robison himself being then intent upon providing tankage for 1,500,000 barrels of oil at Pearl Harbor.

Fall maintained that the Government paid too much for its storage when compared with the cost of commercial tankage and told Robison that he would have inquiries made to ascertain just what a commercial concern could obtain storage for.

Secretary Fall and Mr. Doheny were friends of long standing and Fall asked Doheny to obtain data on this cost.

Doheny did so and wrote a letter to Fall dated November 28, 1921, (R. v. I, 162-3).

We shall later discuss this letter in detail, passing it now because our present purpose is to present to the Court the facts regarding Secretary Denby's making of these contracts.

Suffice it at this moment to say that Mr. Doheny's letter was immediately sent by Mr. Fall to Admiral Robison.

On November 29, 1921, there was a meeting of the Secretary of the Navy's Council, a body consisting of the chiefs of bureaus in the Department, supplemented by others of the more important naval advisers, numbering in all about fourteen. The Council constitutes a high court of naval affairs.

The receipt by Robison from Fall of Doheny's letter of November 28th satisfied the Admiral that the Navy could rest assured that it could get built the tanks which he was intent upon having at Pearl Harbor.

It will be remembered, however, that up to this time the Navy had not decided definitely which policy to follow, that of using the oil currently, or storing it as a reserve.

There was settled in Robison's mind what he wanted, but at that time the Secretary of the Navy had not decided.

There were present at the Navy Council meeting of November 29th, Secretary Denby, who presided; Assistant Secretary Roosevelt; Admiral Coontz, the Chief of Operations of the Navy, the senior naval officer who was an adviser to the Secretary of the Navy; Rear-Admirals Washington, McVay, Robison, Taylor, Potter (who was Chief of the Bureau of Supplies), Stitt, Latimer (who was Judge Advocate-General), Moffett and Smith; Captains Bakenhus (representing the

Bureau of Yards and Docks) and Willard; Commander Rowcliff, and Major General Lejeune, of the Marine Corps.

Here were gathered the two civilian heads of the Navy Department; the Admiral of the Navy; ten Rear-Admirals, among whom were the head of the Bureau of Engineering, the head of the Supply Department, and the head of the Legal Department of the Navy, and the others above mentioned.

A stenographer was present at these Navy Council meetings and while in many instances it is quite apparent he had difficulty in catching the running conversations participated in by several, and his reports are fragmentary and sometimes not entirely clear, yet the substance of the discussions is ascertainable.

The notes of the proceedings of the Navy Council meeting of November 29th, appear in R. v. II, 971-5, and from them we find that early in the proceedings Admiral Coontz called upon Admiral Robison "to tell us of the oil situation" and Admiral Latimer "to tell us as to the legality of using it."

Admiral Robison informed the Council on the subject of quantity and then expressed his views as to the wisdom of the policy of transforming this reserve from its unavailable character "into a tangible reserve to be located as in accord with our plan for national defense," adding that the first step was to provide at Pearl Harbor storage for 1,500,000 barrels of fuel oil, the tanks for containing this oil to be paid for out of royalty oil. He stated, obviously referring to Mr. Doheny's letter of November 28th, that he had a definite proposition to supply that, and he testified below that that was the most definite proposition in hand at the time, and that he intended to convey to the Council the information that "We are assured that we can get the tanks built." (R. v. II, 976.)

Secretary Denby participated in the discussion and stated that the matter had been the subject of discus-

sion at the Cabinet that morning; that in his mind there were two questions, first, that of the legal right under the law; and, second, whether it was desirable to use the oil at the time. He expressed the opinion that it would be better to store it, which would conform to the reserve theory.

Admiral Coontz was apparently in favor of using the oil currently, stating that inside of two months the Navy would run out of fuel, and he wanted Robison to advise how large the supply of oil from the reserves was going to be and Latimer, the Department's law officer, "to tell us if we can use it" (R. v. II, 972).

During the discussion Judge Advocate General Latimer expressed the opinion that the law authorized the Secretary of the Navy to do anything he desired with the oil, that his powers could not be broader.

Admiral Robison pressed for instructions and the Secretary stated that he would have to go into the matter further and that he did not want to decide the matter of national policy involved in the general plan of war reserves until he had seen the President and probably taken the matter up again with Congress.

Admiral Latimer read to the Council meeting the Act of June 4, 1920, after which Secretary Denby stated—"Under that power we can adopt the policy" (R. v. II, 975), but told Admiral Robison not to go ahead with "those tanks" until he, Denby, had seen the Congressional Committee (ib.).

Thus stood the matter when Secretary Fall left Washington December 1, 1921, not to return until January 27, 1922, (R. v. I, 174), during which time he did not communicate with any one in the Navy Department.

Following that Navy Council meeting Admiral Robison, by direction of Secretary Denby, in writing requested the Judge Advocate General of the Navy for opinions.

Two communications were addressed to the Judge Advocate General, both dated November 30, 1921.

One appears at page 697 and requests opinion as to whether it would be legal to exchange royalty crude oil from the naval reserves for fuel oil in storage at Pearl Harbor or other points to be later designated by the Navy, the Government to acquire as its property in exchange for crude "the oil in storage at Pearl Harbor, as well as the tanks and appurtenances" (R. v. II, 698). The other letter to the Judge Advocate General asks for an opinion as to the legality of using the royalty oil currently on naval vessels. (R. v. II, 981.)

By law the Judge Advocate General's office is charged with the duty of advising the Secretary of the Navy respecting contracts, the construction of statutes, and his powers under the law. Here were the attorneys provided by the Congress to advise the Secretary of the Navy and to them he turned.

Counsel in this case entered into a stipulation that at all times referred to in the bill of complaint "the following were facts" (R. v. II, 696):

That the opinion of the Judge Advocate General on the subject of the acquisition of storage facilities and fuel oil in exchange for crude oil was requested; that this matter was considered by Judge Advocate General Latimer, by Assistant Judge Advocate General Woodson, and by an attorney in that office named Dyson; that an opinion dated December 2, 1921, was rendered on the subject and that

"said opinion * * * was forwarded to and considered by the Secretary of the Navy who discussed the subject matter thereof on or about December 5, 1922, with said Latimer and said Robison and in the presence of the two last named officers the Secretary of the Navy approved said opinion indicating his said approval by dating and signing the said opinion at the foot of the second page thereof; at the same time and after the aforesaid discussion, and in the presence of the said Latimer and Robison, the said Secretary of the Navy, Edwin Denby, with his own hand on the margin of the second page of the original of said

opinion wrote the following: 'Do this. E. D. Dec. 5th, 1921' " (R. v. II, 698-9).

Let us pause to note that here is a solemn agreement by plaintiff that this opinion was not only received by Secretary Denby but was considered by him; that it was not merely considered by him but that its subject matter was discussed by the Secretary of the Navy with his legal adviser and his "personal representative in active charge of naval fuel matters."

Turning to the Judge Advocate General's opinion, which covers several pages, this will be found (R. v. II, 702):

"Answering your questions, specifically, you are advised:

(a) It would be legal to exchange the royalty crude oil for fuel oil in storage at Pearl Harbor or other points to be designated by the Secretary of the Navy under arrangements whereby the exchanged oil shall be stored in tanks provided by the lessees of the oil wells, such tanks and their appurtenances to become the property of the United States."

And in the margin—

"Do this.
E. D.
Dec. 5th,
1921."

The following paragraph (b) relates to the current use of oil.

Here then the Secretary of the Navy himself decided the policy. Here then was the first definite decision as to whether the oil should be used currently or should be stored under an arrangement whereby storage facilities and fuel oil were received in exchange for crude oil. Here the Secretary of the Navy, after consideration and discussion, himself, by his own hand, concisely but specifically directed what should be done.

In the discussion in Secretary Denby's office on December 5th Secretary Denby "determined that the en-

tire royalty oil should be used to pay for the Pearl Harbor contract and not for current use, and so stated" (R. v. II, 990). Admiral Robison and the Secretary discussed at length this question (ib. 991).

That Denby knew exactly the importance of the step he was directing admits of no doubt from the uncontradicted testimony that—

"there was a discussion in the Secretary's office among the Secretary, Admiral Latimer and the witness, on December 5, 1921 * * *; prior to the time that the Secretary wrote these words" (Do this) and during that discussion "the Secretary said he had gone over the opinion in detail; that he had approved it; that it seemed that it was necessary for us to go ahead without waste of time to the accomplishment of the Pearl Harbor project, and he told witness to prepare the necessary order from the Secretary to the witness to put that project into effect" (ib. 982).

Admiral Robison, having stated that the Secretary's O. K. on the opinion would be sufficient, the Secretary—

"put abreast the Pearl Harbor plan" the words "'Do this. E. D. December 5, 1921'; that was a definite order upon which witness proceeded thereafter; as the Secretary was about to sign the Judge Advocate General's opinion, with his approval, witness said: 'Wait a moment, Mr. Secretary. You realize that this is a pretty risky proposition, don't you?' The Secretary said, 'Why?' Witness said, 'Well, oil is something that no one can touch without risk.' 'Well,' said the Secretary, 'that is all right, Robison, but the way you put it you make it a matter of duty and I have got to sign it' " (ib. 983).

And Robison adds about his former chief, "He was that kind of a man."

Fall had no connection whatever with the foregoing. He made no request or suggestion regarding it. He was not in Washington. Prior to leaving he had given instructions with respect to the handing of royalty oil

which contemplated its being turned over to the Navy for current use, instructions entirely inconsistent with the plan which the Secretary of the Navy now directed his subordinate to put into effect.

Robison immediately took the subject up with the Bureau of Yards and Docks, communicated Secretary Denby's instructions, and directed that Bureau to hasten with the preparation of the plans.

December 8, 1921, the Navy Council met. Fuel was discussed. Robison stated to the Council the substance of what had been done and what was under way with respect to the exchange of crude oil for fuel oil and tanks at Pearl Harbor (R. v. II, 984). A letter had been prepared by Captain Bakenhus of the Bureau of Yards and Docks to the Interior Department requesting that Department's assistance with this project and that letter, which was prepared for the signature of the Secretary of the Navy, was presented to and made the subject of discussion at the Navy Council meeting. It contained a paragraph which according to those present seemed to cast doubt upon the legal power of the Government to make the contemplated contract, and suggesting that better contractual terms might be obtained if Congress would pass a new law setting forth, in more exact terms than the existing law, the power of the Navy Department to do what it intended to do (ib. 988; v. III, 1080-81).

The Secretary of the Navy disapproved the raising of that question, saying:

"I never questioned there was the slightest illegality. The question, therefore, should not be raised" (ib. 986).

When the author of the letter, Captain Bakenhus, stated his reasons Admiral Coontz voiced his objection and expressed the opinion that the Secretary had settled this (ib. 986). The chief law officer of the Navy suggested that the sentences being discussed be left out and an examination of the minutes on page 986

shows that that letter was before this gentleman. Admiral Coontz suggested a recasting of the letter and the so-called "passive" Secretary of the Navy peremptorily directed that—

"Anything that goes to the Secretary of the Interior must go through me" (ib. 986).

One has but to read these minutes of the Navy Council meetings to see that we had a functioning Secretary of the Navy, guided, as any sensible man in his position would be, by the naval experts around him, but, when once he had been enlightened, giving orders and directions as to what those experts and others under him should do.

The letter was recast. It bears date December 9th, and it was signed by Theodore Roosevelt as Acting Secretary of the Navy. It is Exhibit No. 62, Vol. I, 329.

Prior to that letter Admiral Robison had advised Acting Secretary of the Interior Finney (Mr. Fall it will be remembered being absent from Washington) of the Navy's plans and of the opinion of the Judge Advocate General and Solicitor of the Navy as to its legality and Finney directed the Bureau of Mines to proceed to assist the Navy in its program (R. v. I, 326).

The Bureau of Mines of the Interior Department, in conjunction with the Bureau of Engineering and the the Bureau of Yards and Docks of the Navy, undertook to launch this project.

Plans were prepared in the Navy's Bureau of Yards and Docks. They were sufficient for preliminary purposes but later turned out not to be definite enough for a lump sum bid plan, which was insisted upon by the Navy early in the next year.

Admiral Robison and the Dohenys were friends. This friendship began when Edward L. Doheny, Jr., was an officer of the Navy, subordinate to Robison on the latter's ship, during the world war. It has continued ever since (R. v. II, 952-4).

Doheny, Jr., visited Washington December 12th,

1921, to enlist Admiral Robison's assistance for a former comrade of theirs aboard the same naval vessel during the war. The purpose of that visit disposed of, young Doheny dined that evening at Admiral Robison's residence with the Admiral and his wife, and the Admiral discussed some of his naval oil reserve problems (R. v. II, 993-4) and after the young man returned to New York he wrote the Admiral a letter on that subject (R. v. I, 343). That letter concluded with the statement that the elder Doheny would be in Washington the following Saturday and that the Admiral might take advantage of that fact "to have a chat with him." And—

"Admiral Robison saw Doheny Sr. at the end of that week, or the beginning of the next, in the Admiral's office in Washington, and then talked with him about the plan for the Pearl Harbor project; this was a long conversation lasting at least an hour and a-half; * * *

"Mr. Doheny said to the witness that he had already considered the project, but that his people were against it; that they had some interests out here in California but no such considerable interests as they would have to create in order to go ahead with the proposition, and that he had made up his mind to turn it down;" (R. v. II, 994-6.)

Referring to the same matter on cross-examination the Admiral testified:

"About that meeting with Mr. Doheny when he came to witness' office in December, during the conversation he said that his company did not want to go into this proposition. It is quite out of the question for witness to tell the order of events in a conversation like that. He told witness that his company—that he had heard of this from the Interior Department and that he had considered it, but that there was great opposition to the matter in his company and he determined not go into it." (R. v. III, 1084.)

"When Mr. Doheny talked to witness in December, 1921, he said the matter had been under con-

sideration by him, that it had been brought to his attention by the Interior Department, but that the people of his concern objected to it—that they had some interest, witness thought he said, in the vicinity of California but no such considerable interests as would justify in the opinion of the rest of his company the large expenditures that would be required. Witness understood from what he said that he meant interest by way of ownership or leases of oil lands. He did not state to witness when or where they had changed their minds after the letter of November 28, 1921, was written, but said that he had made up his mind to give it up or to stay out of it.” (ib. 1116.)

Let it be borne in mind that this was the position of E. L. Doheny subsequent to the middle of December, 1921, as regards a project which in this case it is charged he had conspired to go into prior to November, 1921.

Admiral Robison “also told Doheny of the plan for the use of the oil for current naval needs, and how he had fought it, and beaten it, for the purpose of making it available in Pearl Harbor, to accomplish the prevention of the possibility of the invasion of the West coast of the United States. ‘And I talked to him about what war is like; not in terms of dead men, but in terms of shame, and I told him that it couldn’t be done except by the exchange of crude oil, and I appealed to him to help in the accomplishment of the security of this part of the country. I tried to show him that it would not involve any risk to him.’

‘I told him that he couldn’t furnish us any real facilities that would cost him money without sooner or later his getting the money back from the Government, even if he didn’t get the oil back out of the ground.’ ‘I told him the thing involved was so great as to involve the security of this country.’” (R. v. II, 995-6.)

Admiral Robison had formerly testified that while in court giving his testimony in this case he was under orders from naval authorities with respect to the subject of his testimony and with regard to what could

and what could not be disclosed and his written orders had been exhibited to the court without being made part of the record (ib. 968-9).

With this in mind it will be noted that in this part of the testimony we are reviewing (ib. 996) the Admiral was asked to state, without repeating the facts in court, whether he told Mr. Doheny anything about the necessity for action, and he answered that he had but did not give him all the information he had by any means and continued:

"But when I had got him interested I kept on because I wanted to be sure I could get the job done, and I didn't let him go until he, with red eyes and a white face, said, 'Well, Admiral, go ahead; you can depend upon it you will get one bid.' " To which Mr. Doheny added: "'And what is more, I will tell you, Admiral, if you get a bid from me, or from my company, it will be one that won't involve one cent of profit to me.' " (ib. 996.)

"In the conference in December with Mr. Doheny nothing was said about further leases. There were no further leases in the plan that was proposed." (R. v. III, 1085.)

Thereafter, through months of preparation, conferences, negotiation, Admiral Robison, who had reported this conversation to Secretary Denby, kept in mind that assurance and, as he testified below, because of it he had faith in the practicability of the project which his department considered of vital importance to the country.

The Secretary of the Navy under the law, as we contend, had power to make the contemplated contracts by negotiation and without resort to competition of any kind. But it was decided by Director Bain and Admiral Robison to seek competition from among large oil and engineering concerns, and competition was sought.

We stress this matter, not in connection with the construction of the law but in connection with a con-

sideration of the facts, because it is so utterly inconsistent with the charge that there was a conspiracy formed prior to November, 1921, which had for its purpose the secretly making of the contracts and leases here in suit with the defendant companies, as to constitute an all-sufficient answer to the charges of fraud and conspiracy.

Secretary Finney turned over to Dr. Bain the Navy's definite plan as communicated to the Interior Department, first orally by Admiral Robison and subsequently by letters of Secretary Roosevelt December 9th, (Exhibit No. 62, R. v. I, 329) and of Secretary Denby of December 14th, (Exhibit No. 66, v. I, 339).

Mr. Finney testified that the "basic reason" for his action was the direction of the Secretary of the Navy communicated through Admiral Robison (R. v. II, 510).

Dr. Bain's instructions from Finney were "to try to work out a plan which would accomplish what the Navy wanted" (ib. 719).

The details of the subsequent negotiations, as shown by the record, have been hereinbefore sufficiently set forth in the "Statement of Facts". Throughout all of the negotiations resulting in the contracts and leases in suit, and all of the acts relating thereto and to naval reserve matters which took place in the departments, Admiral Robison was constantly in contact with Secretary Denby on the subject and—

"never did one thing in this oil business without being approved by Secretary Denby first" (R. v. II, 1005).

We have seen that when bids, preceding the April 25th, contract, were received and opened, they were discussed with Secretary Denby; that in detail the provisions of the Transport Company's Proposal B were considered by him in consultation with Admiral Robison (R. v. II, 1003); that Secretary Denby and the Admiral exchanged views as to the interpretation upon

the clause asking a "preferential right" to future leases and discussed the direct saving to the Government which would result from the acceptance of Bid B (R. v. II, 1004; v. III, 1097), as a result of which, before Secretary Fall was even advised of the bids, and without any recommendation, request or suggestion, not to speak of influence, from him, Secretary Denby instructed the acceptance of the Transport Company's Bid B and Admiral Robison informed Secretary Finney of that on April 17th (R. v. II, 1005; v. III, 1099). Secretary Fall having been telegraphed and having, in effect, "put the matter up" to the Navy Department, without recommendation on his part, award was made on the 18th day of April and on the same day the public was informed, through a Secretary of the Navy statement issued to the press, of that award (R. v. II, 516-19; 1005).

We have in statement of facts herein traced in detail the situation which resulted in letter of April 25, 1922, approved by Mr. Denby over his own signature, from which grew the lease of June 5, 1922.

But for the fact that on April 15, 1922, the Transport Company was "the lowest and best bidder" (R. v. II, 524) the contracts and leases in suit would not have been made. Upon that, and upon nothing else, is founded all that followed.

SECRETARY OF THE NAVY'S PART IN MAKING DECEMBER 11TH CONTRACT AND LEASE.

In the statement of facts we have also traced this subject in detail and have shown that subsequent to the making of the first contract, as a result of consideration in the Navy Department, neither participated in by nor known to Secretary Fall, or any official of the Interior Department, or Mr. Doheny or any officer of the defendant company, the plan to enlarge the Navy's fuel oil storage facilities at Pearl Harbor was brought about, between May and November, 1922, by

a decision of the General Board, approved by the Secretary of the Navy.

"The plan to enlarge the Navy's fuel oil storage plant facilities, . . . after the April 25 contract had been made, was brought about as a result of a decision of the General Board, approved by the Secretary of the Navy, which in turn resulted in directions to the Bureau of Yards and Docks, to proceed to plan this second project." (R. v. II, 581.)

"This plan originated in the Navy Department and was based upon necessities." (R. v. II, 1024.)

The Secretary of the Navy having directed that the fuel oil storage facilities at Pearl Harbor be enlarged and there being at that time under way the first project, from an engineering standpoint the two projects were so integrally connected that a practical way of carrying on the second would not be to seek a new contractor, but—

"the only logical way was to make it an extension of the first contract." (ib. 582.)

Having before us testimony showing the source of the plan to enlarge the naval reserve oil facilities at Pearl Harbor, let us examine how the adoption of this plan was brought about.

In May, 1922, Admiral Robison, having gotten this first project under way, "called the attention of those responsible for adequate preparation of our Navy for active service to" the condition of the Navy's oil reserve matters. He invited the attention of the head of the War Plans Section of the Navy to the desirability of a complete study of the requirements.

"This was done, and the result of it was an increase in the amount of fuel oil set to be carried in Pearl Harbor."

The quantity was increased to 625,000 tons (R. 1012). But this was not determined until after the middle of November.

While this purely naval problem was being con-

sidered by the naval experts, Mr. E. L. Doheny was spending the summer of 1922 in Alaska.

In the fall of that year he prepared a memorandum—

“which it was stipulated was submitted by Mr. E. L. Doheny to representatives of the Navy and the Interior Departments, to Admiral Robison of the Navy, and to Secretary Fall of the Interior, who turned it over to Dr. Bain.” (R. v. II, 597.)

This memorandum presented a plan foundationed upon the situation brought about by the flush production of petroleum in the California fields. This plan had no reference whatever to Pearl Harbor, in no way mentioned or contemplated any extension of the defendant company's contract for storage facilities there, but, in substance, proposed that if the Government would lease the Pan American Company certain specified areas of Naval Reserve No. 1, the company would construct a pipe-line from the naval reserves to tidewater on the Pacific coast, provide a terminal for the bunkering of naval vessels, and provide storage for 1,000,000 barrels of naval fuel oil on the Pacific coast. It was further proposed to erect a new refinery and to give the Navy certain advantages in the purchase of refined products.

Let us dispose of the action of the Interior Department on the proposal embodied in this memorandum:

Secretary Fall handed Mr. Doheny's memorandum to Dr. Bain sometime in October, 1922, saying:

“‘take it up with the Admiral;’ that is, Admiral Robison, and he did not say anything more on that subject at that time. The witness (Bain) did take that paper up with Admiral Robison” (R. v. II, 789),

with whom he discussed the existing oil situation.

“Admiral Robison suggested that he did not know how far the Navy was prepared to go at that time in provision of further storage, or in opening up the reserves, and that he would take

it up and discuss it with his associates, and with the Secretary of the Navy; there was nothing else that the witness can remember in this discussion with Admiral Robison." (ib.)

Late in October or early in November Mr. Cotter called at the office of Dr. Bain and mentioned this memorandum and asked witness what had been done about it and—

"Dr. Bain told Cotter that the Secretary had given it to witness to take up with the Admiral, and that he had taken it up with the Admiral, and that nothing more would be done unless the Navy wanted something done; witness told Cotter if he wanted to push the matter, or to have any further information about it, to go to the Navy." (ib. 790.)

On October 27, 1922, Mr. E. L. Doheny called on Admiral Robison and discussed with him the petroleum situation in California and in a general way the proposal of defendant company to provide 1,000,000 barrels of fuel oil in storage in San Francisco, or on the Pacific Coast, to be available for Navy use on demand, and a pipeline for the transportation of oil, including the Navy's royalty oil, from reserves to tidewater, in consideration of a lease or leases "upon certain areas of our No. 1 Reserve not yet developed."

Immediately after this conversation between Mr. Doheny and Admiral Robison the Admiral reduced the substance thereof to a memorandum which he dictated at once, and

"which he used so as to fix what took place in his mind, and which he also used to enable him to be sure that he told Secretary Denby the whole story, after which he made that memorandum a part of the Navy Department's files" (R. v. II, 1015).

Admiral Robison's memorandum shows that the areas which the defendant desired to lease

"do not include that portion of our reserve that it will be profitable to leave in the ground" (ib. 1017).

Admiral Robison notes that the proposition is "attractive to us" but "does not measure by any means all that we can get" (ib. 1017). The memorandum shows, and Admiral Robison testified, that at the conference between himself and Mr. Doheny on October 27, 1922,

"nothing was said by either with regard to an increase in Pearl Harbor project; the Pearl Harbor subject was not mentioned at all except in connection with so much thereof as was then under construction" (ib. 1022).

And—

"In the conversation with Mr. Doheny on October 27, 1922, nothing was said about leasing the entire reserve to the Pan American Company, and Mr. Doheny did not ask it, or suggest it" (ib. 1023).

As Admiral Robison had requested, and Mr. Doheny had promised, in this conference of October 27, 1922, the latter under date of November 6, 1922, transmitted to Admiral Robison a more detailed memorandum of his plan with respect to the oil situation in California (R. v. II, 598-608).

Mr. Doheny's revised proposition set forth the services which it was proposed to perform for the Government and there was appended to the memorandum tables suggesting ideas as to the number of sections to be leased in the event of action by the Government on the proposition. The areas which, in substance, a lease was being applied for, range from a minimum of four sections to a maximum of 19 sections. That this was the substance of the application was stipulated below (R. v. II, 607-8).

We emphasize: First, that this proposition had no reference to the Pearl Harbor extension plan which was afterwards embodied in the contract of December 11, 1922. There was not the slightest suggestion on that subject and yet the District Court says there was (R. v. III, 1361), although this is all the subject of documentary evidence. Second, the proposition

neither requested nor contemplated a lease of the entire reserve.

Copy of this November 6th memorandum was transmitted to Secretary Fall and at this point we dispose of the action of that officer and of his department as regards it:

"Mr. Doheny's second memorandum came to Dr. Bain, through the Secretary's office; witness (Bain) received instructions with respect to the subject matter of that memorandum from Secretary Fall, which instructions were to do nothing except as the Navy wanted it done; the Secretary at this time further said that it was Navy business; witness did not take this second memorandum up with anybody, but waited for the Navy to take it up with him, and they took it up almost immediately, Admiral Robison from the Navy Department taking it up. Prior to the receipt by the Interior Department of letter dated November 29, 1922, from the Secretary of Navy, Admiral Robison told the witness that he was discussing the subject of the above mentioned memorandum with the officials of the Navy, and he thought that the Navy would decide to go ahead; witness does not recall that anything was said in that discussion to him by Admiral Robison about Pearl Harbor.

"After the talk with Admiral Robison which the witness has last testified to, the next thing he recalls was the receipt of the letter of November 29, 1922" from the Secretary of the Navy (R. v. II, 790).

In the Navy Department, entirely independent of Mr. Doheny's proposition, and equally independent of any suggestion or recommendation of any kind from Secretary Fall, consideration was being given to greater naval oil reserve facilities at Pearl Harbor and in November, 1922, the amount of that storage was crystalizing.

About the 15th or 20th of that month Messrs. Cotter and Anderson of the Pan American Company called on Admiral Robison and they brought up the subject of

Mr. Doheny's November 6th proposition and Admiral Robison—

“told them of the Navy's need for about two and one-half million barrels more of oil in Pearl Harbor, and that he wanted everything that Mr. Doheny offered, and this additional two and one-half million barrels, together with storage facilities therefor” (R. v. II, 1022-3).

November 20, 1922, Admiral Robison addressed a communication to the Secretary of the Navy through the Chief of Naval Operations in which it is stated that the storage for 1,500,000 barrels at Pearl Harbor is nearing completion and it is desirable that information be at hand as to the disposition to be made of royalty oil from Naval Reserves Nos. 1 and 2 (R. v. II, 611). Subsequently the Chief of Operations forwarded this paper to the Secretary of the Navy recommending that the next project to be undertaken in disposing of the royalty oil be increasing the total of all petroleum products at Pearl Harbor to figures which are set forth on page 612 and which figures it may be stated are those for which facilities were later provided for in the contract made December 11, 1922.

“By November 20th witness (Robison) knew that the Navy had approved an increase of storage tankage at Pearl Harbor” (R. v. III, 1104).

On November 22, 1922, Admiral Robison in a letter to the Bureau of Yards and Docks advised that he had been informed that the approved war plans provided for storage facilities for petroleum products in the Hawaiian Islands, including fuel oil, lubricating oil, Diesel oil, submarine lubricating oil, aviation oil, aviation gasoline, and gasoline, in the quantities exactly the same as those listed in the last mentioned communication from the Chief of Naval Operations to the Secretary of the Navy. Admiral Robison requested information as to whether or not the storage facilities could be provided within the limits of the existing naval station at Pearl Harbor (R. v. II, 614-15).

The information which Admiral Robison incorporated in his November 22nd letter, he had received "orally from the Secretary", who informed him "of the approval of the quantities listed therein as additional facilities to be installed at Pearl Harbor" (R. v. II, 1024). Admiral Robison had confirmed the figures "by personal application to the office where they had been compiled".

Secretary Denby issued oral instructions to Admiral Robison to prepare a letter requesting the assistance of the Interior Department to take up the subject of a revision of the existing contract with the Pan American Company so as to obtain the additional facilities which the Navy wanted and provide for the leasing of lands in the naval reserve "over such areas of that reserve as would naturally be opened up at once, and as would not be part of a natural reserve which can be maintained more or less indefinitely" (R. v. II, 616).

Admiral Robison dictated, pursuant to the instructions he had received from Secretary Denby, a letter to the Secretary of the Interior which is dated November 29, 1922. It is set forth at pages 616-618, and the substance of it we have just briefly stated. It was later made part of the December 11 contract.

Having prepared that letter the witness took it—

"in person to the Secretary of the Navy and went over its subject with him before he signed it" (R. v. II, 1023).

As already stated prior to that time he had received instructions regarding it from the Secretary. Secretary Denby personally signed that letter (ib. 1023-24).

"Prior to the writing of the letter of November 29, 1922, witness may have told Secretary Fall that the Navy was going to ask for additional facilities at Pearl Harbor, but he does not think he did;" (in passing let us say that there is no evidence whatever that Fall knew, or had heard directly or indirectly of the project before the

November 29th letter;) "Secretary Fall had not said anything to the witness, or asked him to get up that sort of an application; 'This plan originated in the Navy Department and was based upon necessities.' " (ib. 1024).

In the Interior Department the only action taken by Secretary Fall upon receipt of Secretary Denby's letter of November 29th was to refer it to Dr. Bain without any instructions (R. v. II, 791).

In the Navy, following the writing of that letter of November 29th, Admiral Robison—

"telephoned to the New York office of the Pan American Company, and asked them to send someone down to Washington, and promptly conferences began" (R. v. III, 1025),

some of which took place in witness' office and most of which took place in the office of the Director of the Bureau of Mines, there being present Admiral Robison, Dr. Bain, sometimes with and sometimes without Mr. Ambrose, Mr. Cotter, sometimes with and sometimes without Mr. Anderson. Mr. Doheny was present at the first meeting at which there was a general discussion and at one other meeting, the last prior to the execution of the contract, which we shall come to in a little while. The negotiations between November 29th or 30th and December 11th were constant, conferences occurring about twice a day (R. v. III, 1025; R. v. II, 791).

Now as to the source of the first suggestion that the entire unleased area of Naval Reserve No. 1 be leased. All of the evidence on this subject we now present:

"Admiral Robison was the one who first mentioned the matter of making a lease of all of the naval reserve No. 1, in connection with this extension of the Pearl Harbor project. Prior to the time when the witness suggested that action by the Government, neither Mr. Doheny nor anybody representing the Pan American Company, made any application for a lease of all of that reserve." (R. v. II, 1023).

He does not recall what was said on the subject during his conversation with Anderson and Cotter in November, 1922, but Admiral Robison—

“suggested ultimately, in that or a subsequent conversation, the lease of the entire No. 1 reserve, subject to retention ‘by us of that portion that we did not feel required drilling, for protection of the reserve property,’ and what might roughly be called the western half.” (ib.)

“It was in the early part of these negotiations that the matter of the leasing of the entire unleased portion of Naval Reserve No. 1 came up, at which witness (Robison) said on that subject that he ‘thought that we could well afford to let the whole of it in; that it would probably increase the benefits that we would get out of the deal’; witness is referring to No. 1 reserve, he means; the witness said this to Dr. Bain, and to Mr. Cotter.” (ib. 1025-6.)

We have seen that no one in the Pan American Company asked for a lease on the whole reserve. Secretary Fall did not suggest the leasing, request it or recommend it.

The only one who suggested the leasing of the whole reserve, or any major portion of it, was Admiral Robison, as he reiterates with emphasis on his cross-examination (R. v. III, 1110; 1124-5).

The only other shred of testimony on this subject comes from Dr. Bain (for he it remembered that the plaintiff adduced no testimony on this point), who testified that—

“Admiral Robison said (to Bain) that the Navy would lease the whole reserve if they got enough for it; that he was anxious to have drilling restricted as far as could be done, compatible with making the kind of a bargain that the Navy wanted; the matter as to what section or part of the reserve he wanted restrictions on came up later.” (R. v. II, 791.)

In immediate charge of the negotiations was Robison. His mainstays in respect of oil land subjects were

Bain and Ambrose of the Bureau of Mines. These two, as Dr. Bain expressed it, supported Admiral Robison in his position "as we were acting for the Navy" (R. v. II, 793).

The negotiators, between November 30th and December 8th, after heated discussions, agreed upon all points except a schedule of royalties to go in the lease which it was proposed the Government would enter into with the Pan American Company in consideration of what the Company was agreeing to do, without other profit, for the Government. During these negotiations Admiral Robison, as he frankly said in his testimony below, was trying to get all he could for the Navy out of it (R. v. III, 1026). Several pages of the testimony are devoted to the discussions in these negotiations toward the end of which Mr. Anderson of the Pan American Company, supported by Mr. Cotter, was found insisting that the schedule of royalties range from 12½ to 20 per cent as provided in what are known as the Interior Department regulation royalties, and Admiral Robison, supported by Bain and Ambrose, was insisting on a schedule which began at 14% and ran up to maximums of 30 and 35 per cent.

Bain and Ambrose prepared a tabulation of all royalties which the Government was receiving, and found what average royalty the Government was obtaining and Bain went to Secretary Fall to talk that matter over, taking with him the sheets containing the figures prepared by himself and Ambrose (R. v. II, 794). Secretary Fall and Dr. Bain worked out—

"an intermediate or compromise set of royalties as being a fair basis, and one which perhaps could be agreed upon. These were worked out in pencil and typewritten copies made in the Secretary's office; Secretary Fall instructed the witness to take that up with Admiral Robison; he also, either at witness' suggestion or at his own, or it was agreed that witness should give a copy to Mr. Cot-

ter, and he would see if Mr. Doheny would take it up; * * * witness did take the copies downstairs and gave one to Mr. Cotter and told him to take it up with Mr. Doheny, while the witness took it up with the Admiral; Admiral Robison studied it and came back and talked to witness and Mr. Ambrose; the conference at that time had broken up; Admiral Robison also went up and talked it over with Secretary Fall; witness was not present at this talk; Admiral Robison came back and stated he wanted to do some more trading; that he still thought he could get a higher royalty; there followed a further conference on the subject of royalties in Dr. Bain's office, at which there were present Admiral Robison, Mr. Ambrose and Dr. Bain, and Mr. Doheny, Mr. Anderson and Mr. Cotter" (R. v. II, 794-5).

Robison, who had been reporting to and taking directions from Secretary Denby during the negotiations, laid this matter before Mr. Denby. On December 8th he prepared a memorandum on the subject at the top of which there is a note reading: "Statement by Admiral Robison for his use in presenting case to Secretary of the Navy." (R. v. III, 1032.)

That memorandum is a full expression of Robison's views. He took it to the Secretary of the Navy and had a conference with him and after he went over the subject with the Secretary—

"the final instructions that witness received from Mr. Denby were to go ahead and do the best he could; he went over this memorandum with the Secretary and then received those instructions." (R. v. III, 1032.)

Admiral Robison's memorandum of December 8th was placed upon the files of the Navy Department from which it was produced and put in evidence (R. v. III, 1033).

Having thus presented the matter to the Secretary of the Navy and having gotten the latter's authority, Admiral Robison called upon Secretary Fall and told Secretary Fall that he wanted a schedule beginning

with one-seventh royalty for a minimum and Mr. Fall said—

“Go ahead and see if you can get it out of the old man; I can’t.” (ib. 1031.)

And directly as the representative of the Government Robison entered the conference to which we have already referred. Both Dr. Bain and Admiral Robison testified below regarding it. And there is no other evidence whatever on the subject.

Present at that conference were Doheny, Cotter and Anderson, for the defendants, Robison, Bain and Ambrose for the Government.

At that conference the actors were Robison and Doheny.

Robison did the trading (R. v. II, 793-5).

He argued for an increased royalty, arguing the advantages to the Pan American Company big and the advantages of the deal to the Navy small (R. v. III, 1031).

There was a lengthy talk (R. v. III, 1029). Mr. Anderson of the Petroleum Company was present throughout and insisted his company did not want the contract at any price, and could not get along under a schedule of royalties exceeding that commencing at 12½ and running to 20 per cent, and he did not want the contract under the royalties Mr. Doheny said he would agree to (R. v. III, 1039-40).

Robison had previously been assured by Bain and Ambrose that the compromise schedule was materially better than—

“ ‘we could otherwise obtain and was an excellent bargain for us, quite irrespective of the casual advantages, such as that of 4,000,000 barrels’ in storage.” Admiral Robison “appealed to Mr. Doheny to make it bring a royalty of one-seventh for a minimum. Mr. Doheny said he had gone as far as he thought he could. Admiral Robison said he wanted to be sure ‘that you don’t beat us, or bilk us, or some word like that.’ Mr. Doheny responded that if there was any talk of that kind

this is off right now and he said he had gone his limit; he did not state this quietly and witness was convinced he meant what he said and once more he thought he had better act quickly, so he said: 'We will accept this proposition, then'; that is the way the final agreement was arrived at." (R. v. III, 1031-2.)

Bain states the matter substantially the same as Robison, his evidence showing that Doheny and Robison negotiated directly and—

"finally the Admiral agreed to the schedule which was a compromise schedule, and which went into the December 11, 1922, lease." (R. v. II, 795.) "As regards recommendation made as to the royalties for the December 11, 1922, lease, the Bureau of Mines, Mr. Ambrose and [Dr. Bain] in that bureau 'recommended the lease on those terms, the Navy decided whether the lease was to be made.' " (ib. 799-800.)

Robison tells the Court, and there is no evidence from any other source except this on the subject, that after this conference of December 8, 1922—

"he reported to Secretary Denby on the subject, telling the Secretary on either the night of the 8th or the morning of the 9th that he had to accept the terms that began with 12½ per cent and went up to 35 per cent, the terms that are in the lease; the Secretary asked the witness if it was the best he could get and the witness replied in the affirmative and stated that he had tried hard and the Secretary said, 'All right.' " (R. v. III, 1039.)

Then Robison wrote, under date of December 9th, a letter to the Secretary of the Interior, in substance authorizing the draft of the lease and contract upon the terms and conditions, and with the royalties, which are found in these documents in the record (R. v. II, 798-9).

The contract having been drafted in rough it was taken by Admiral Robison to Secretary Denby and the two went over it "in detail and at length." There followed its revision by the Judge Advocate General and Solicitor of the Navy and its signing on December 11th.

In addition to the specific facts in evidence as to the steps taken by Admiral Robison and Secretary Denby, the actions of Denby on every important phase of these cases, Admiral Robison, testifying emphatically and without dispute or contradiction, in general terms regarding the performance of his duty under the immediate direction of Secretary Denby, said:

After taking up the duties assigned to him by the Secretary of the Navy in October, 1921, as the Secretary's representative in charge of naval reserve matters, Robison—

“talked to Secretary Denby right along.” (R. v. II, 959.)

“while he was having conferences with Fall, Bain and Ambrose, the witness saw Secretary Denby on the subject every time he saw Secretary Fall; either before, or perhaps before and always afterwards; witness made himself genuinely a personal representative of the Secretary of the Navy, and he had to inform himself of Mr. Denby's ideas, and plans, in order to accomplish that; he always made known to the Secretary of the Navy the subject of any conference; the details were reported to the Secretary, and sometimes the plans, the projected conference, was discussed before it took place; so that it may be said that Secretary Denby was informed by the witness of the information concerning these reserves, and their conditions, just as he gathered it, whether from the Navy Department files, or from the Interior Department conferences; he was given the information concerning the condition of these reserves by the witness just as fast as the witness got them” (R. v. II, 960-1).

“Secretary Denby gave to” the letter of October 25, 1921, “the name of ‘Policy letter,’ and that is the term used thereafter by Admiral Robison and Secretary Denby in referring to it in their conversations about it” (ib. 961).

“Admiral Robison discussed” the question whether the oil should be used for current pur-

poses or placed in storage "with Secretary Denby upon repeated occasions other than that at council meetings; the witness was against the use of the reserve for the accomplishment of the current needs, and recommended that the reserve be used for the accomplishment of a military reserve" (ib. 965).

As regards the question whether Robison had any talk with Secretary Denby when the latter signed the letter of December 14, 1921 (Exhibit 66, R. v. I, 339)—

"witness (Robison) had talks with the Secretary so frequently that he cannot state definitely that he talked this particular thing—yes, he can; there was nothing that he did not talk over, so he must have talked over this" (R. v. II, 989).

"Witness (Robison) never did one thing in this oil business without being approved by Secretary Denby first" (ib. 1005).

Upon this record, as we have summarized it, with much to amplify it but nothing to modify it, with innumerable details, to which more space must not be given, to strengthen it, but no word of evidence to weaken it, the District Court found that Denby did not know what he was doing and took no real part in this transaction, and that Fall dominated, directed and controlled it. Well might it be asked, what could a Cabinet officer, a man in Denby's position, do other than as and what Denby did? Certainly the day has not come when the Secretary of the Navy or the Secretary of War negotiates directly with contractors the details of contracts.

Of a similar situation in the case of *United States v. Mammoth Oil Co.*, involving a lease of the Teapot Dome and a contract for storage facilities on the Atlantic Coast and fuel oil therein in exchange for royalty crude from that reserve, upon a record which we are sure that our opponents will admit was no stronger as regards the acts of Secretary Denby than the record before this Court, Judge Kennedy in the

United States Court for the District of Wyoming, speaking to the contention which was the foundation of Judge McCormick's thirteenth finding in the instant case, said:

"The evidence clearly shows that the negotiations preceding the execution of the lease were actively, earnestly and completely participated in if not dominated by the Secretary of the Navy and his designated representative of that department, Admiral Robison. . . . Not a single significant act was performed without the advice and consent of Robison, the designated personal representative of the Secretary of the Navy, who testified that he consulted continuously with his chief in regard to every proposed move and plan, which evidence is not disputed, although Secretary Denby was presumably available as a witness had plaintiff's counsel desired to call him for the purpose of disproving Robison's statement. The lease was executed by the Secretary of the Navy after full and mature consideration and review of its contents, which must lead to the conclusion that the lease was his legitimate child, brought to life in the exercise of his official discretion. If this suit involved an attempt to fasten the responsibility for the lease upon the Secretary of the Navy, where in the nature of things it logically belongs, the evidence would clearly place it there." 5 Fed. (2d) 344.

It is to be noted that Judge Kennedy, referring to Admiral Robison's testimony that he consulted continuously with his chief in regard to every proposed move and plan, added:

"which fact is not disputed, although Secretary Denby was presumably available as a witness had plaintiff's counsel desired to call him for the purpose of disproving Robison's statement."

In this case the same comment is appropriate, but it is not necessary to refer to Mr. Denby as "presumably available." He was actually available.

In the opinion below Judge McCormick says:

"Mr. Denby although present throughout the trial was not called as a witness" (R. v. III, 1271).

He was present as a witness "subpoenaed on behalf of plaintiff and by order of plaintiff's solicitor" (R. v. I, 101, 104).

Why, if these now undenied facts were not immutably true, was not Denby called?

He was not the subject of any charges.

He was not party to any fraud.

His honor was not reflected upon, his honesty not questioned, his probity not assailed, his patriotism not denied.

There he was in court in response to plaintiff's subpoena. There he remained while this overwhelming record was made.

There can be drawn but one conclusion from plaintiff's failure to call him.

MOTIVES OF THE SECRETARY OF THE NAVY AND OF ADMIRAL ROBISON IMMATERIAL.

The District Court attached importance to what he said the evidence showed as regards the different motives actuating Secretary Denby, on the one hand, and Admiral Robison on the other, in the making of the contracts and leases in suit. He said on this subject, among other things, that—

"The contract and lease of December 11, 1922, were made, as far as Admiral Robison was concerned, to extend his desire to strengthen the national defense by utilizing oil from the naval reserves. . . ." (R. v. III, 1364).

and that Denby—

"relied entirely upon Admiral Robison for information concerning the contracts and leases and it is shown that he signed them under the belief that they were necessary as protective measures against drainage on the reserves" (ib. 1348).

The Court bases this statement of motives upon evidence which reads:

"The controlling reason for that contract so far as the Government was concerned was not a question of price. maintenance or price stabilization, but was that the Navy would get this storage project under way. To witness' mind this was the most important advantage. To the mind of the Secretary of the Navy witness believes the most important advantage was that permanent security against drainage would be secured. Witness is unable to state that, but to witness the most important advantage was the provision of security to the nation" (R. v. III, 1126).

There is no evidence that the defendants, acting by anybody, made any representation, directly or indirectly, to Denby on the subject. There is no evidence that Fall, or any one by his direction or authority, made any representations to Denby directly or indirectly on the subject.

This being so, it is difficult to understand the relevancy of any reference to the difference in entirely honorable motives which may have actuated Admiral Robison and Secretary Denby.

It is certainly an elemental rule of law, that courts cannot review, interfere with or disturb, much less strike down, acts of executive officers, within the scope of the authority given them by the law, because the courts may not agree with the judgment with which such acts were performed or may think the same unwise or impolitic, or even entirely mistaken.

"It is too well settled to admit of dispute at this day that where there is a discretion of this kind conferred upon an officer or a board of officers and a contract is made in which they have exercised that discretion, the validity of this contract cannot be made to depend on the degree of wisdom or skill which may have accompanied the exercise."

U. S. v. Speed, 8 Wall. 77, 83.

The District Court, concluding that the lease involved in this case was not, in his judgment, necessary at the time for the protection of the naval petroleum reserve from drainage from privately

owned adjoining land, and believing from the evidence that Secretary Denby made the leases because his belief on the subject differed from the Court's, by his opinion quite clearly shows that he thinks that furnishes some ground for cancellation of the lease. And this despite the fact that after concluding his discussion of the facts in the case the District Judge, when he turned to a study of the provisions of the Act of Congress under which Secretary Denby acted, was forced to hold that—

“Anything done by the Secretary of the Navy in good faith to attain these purposes is lawfully done within the comprehensive, plenary and exclusive act of June 4, 1920” (R. v. III, 1376).

POINT IX.

Secretary Fall Did Not Make, or Dominate the Making of, the Contracts and Leases in Suit.

Let us now review Secretary Fall's connection with these transactions.

The District Court held that they resulted from a fraudulent conspiracy between Fall and Doheny.

To sustain that decision the Court asserted (1), that Secretary Denby did not make the contracts, and (2) that Secretary Fall did make them and bring about their making.

The Court's 12th Finding of Fact states that—

“Said Fall dominated the negotiations that eventuated in the contracts and leases in suit” (R. v. III, 1398).

Although what we have already presented to the Court should, we submit, be sufficient to show the fallacy of that finding, when we turn from the Navy's activities to the record as regards everything that Fall did in connection with the negotiations which eventuated in the contracts and leases in suit, we will demonstrate that the 12th finding is unsustainable.

We put to one side what Fall intended in the spring and summer of 1921 and whatever he or his depart-

ment may, or may not have done with respect to other leases, and we proceed to trace the records as to what he *did* in respect to *these* contracts which were made in 1922.

In the fall of 1921, one man was set upon having navy oil to the extent of 1,500,000 barrels in storage at Pearl Harbor. That man was Admiral Robison. He conferred on this subject with Secretary Fall. The latter stated that he would obtain an estimate of the cost. At Fall's request Doheny, under date of November 28, 1921, submitted figures simply on the cost of commercial tanks and fuel oil to fill them (R. v. I, 162).

The record shows that Fall sent Doheny's letter to Robison, who did not approve it, and nothing more ever came of it. Of this later herein.

Fall left Washington on December 1, 1921, and did not return to that city until January 27, 1922. Before he left Washington, by his direction instructions were given which in effect turned over directly to the Navy the handling of oil derived from the reserves. The plan then was for current use of the oil.

After Fall left Washington, as has already been shown, Secretary Denby decided on the storage policy and directed that steps be taken to provide fuel oil in storage at Pearl Harbor.

Finney, in Fall's absence, and without communicating with Fall, specifically countermanded the orders which Fall had given to Bain on November 30, and instructed Bain to proceed with the plan which the Navy had decided upon, and Finney testified that

"The basic reason for" this action "was the request or direction of Admiral Robison who told him that the Secretary of the Navy had approved that procedure" (R. v. II, 570).

Fall's next personal contact with the negotiations, which actually started subsequent to December 9, 1921, and were all of a preliminary nature prior to March 7, 1922, was this:

On January 1, 1922, Dr. Bain, on his way to the Pacific Coast, stopped at Three Rivers, New Mexico, and acquainted Secretary Fall with the Navy's plan and told Secretary Fall that he, Bain, had "determined" to present the matter to five large oil companies on the Pacific Coast and seek to have them consider it and consent to submit bids on the project, and "the Secretary discussed this with Bain and approved what was being done" (R. v. II, 726).

SECRETARY FALL'S PART IN THE APRIL 25TH CONTRACT.

Fall returned to Washington on January 27, 1922. Bain had arrived in Washington about January 25 (R. v. II, 746). Bain reported the results of his trip to the Pacific Coast to Secretary Fall and to Admiral Robison (ib. 743-4), and Fall at about that time and before February 15, 1922, told Finney and Bain:

"to go ahead and handle this matter; that he was going to be busy on other things" (R. v. II, 745).

Bain summoned to Court by plaintiff, called to witness-stand by defendant, tells us that in those words.

Finney, summoned to Court by plaintiff, and the only Government officer having any connection with this matter, except Admiral Gregory, placed upon the witness-stand by plaintiff, tells us the same thing on page 346 in this language on direct examination:

"after Bain returned from the West he told witness that he had interviewed a number of oil companies and there was a conference in Secretary Fall's office at which the Secretary, Dr. Bain, and witness were present and regarding which witness testifies; 'I recall distinctly that Mr. Fall said he wished Bain and myself to look after the particular matter of the construction of tankage and the filling of it with oil in the West because he would be occupied with some other affairs or business' " (R. v. I, 346, repeated v. II, 511-2).

From then on Bain and Finney in the Interior Department, and Robison and Gregory in the Navy were

active in the handling of the preparations for issuing invitations for proposals, there being a great many details in connection with the changed plans, specifications and conditions, until finally, under date of March 1, 1922, final plans upon which bids could be intelligently made having been worked out, Director Bain prepared and Assistant Secretary Finney sent under date of March 7th identic letters and conditions for proposals for exchange of naval oil to Standard Oil Company, Associated Oil, Pan American Petroleum, J. G. White Engineering Corporation, and Ford, Bacon & Davis, following that a little later by similar invitations to the Foundation Company and the Pittsburgh-Des Moines Steel Company (R. v. I, 374).

The date set for the opening of the bids was April 15.

Fall had so little contact with the matter up to this time that along about April 11 or April 12, when he made inquiries regarding its status, he was surprised to know that bids were not to be received until the 15th of April (R. v. II, 772).

“This apparently was the first time that Secretary Fall realized that the change in the original proposals involved material delay” (R. v. II, 772).

About all that he did, or that was said to or by him during the interval, was that when Admiral Gregory of the Navy Department objected to the plan originally devised by Bain and Robison for bids on a cost-plus basis, and insisted that all bidders be required to submit lump sum bids, Assistant Secretary Finney mentioned it to Secretary Fall who agreed that the cost-plus plan was not feasible—in other words left the matter to the Navy (R. v. I, 357). At this time defendant Transport Company was urging the cost-plus plan and indicating that any other would make it doubtful that it could submit any proposal. (R. v. I, 366-68; v. II, 902-905).

About April 12, Fall learned from Bain, quite ap-

parently for the first time, some of the difficulties attending the project and on that date he wrote his only recommendation on the subject to the Secretary of the Navy, one which, first, was not adopted, and second, which if adopted would have absolutely changed the entire plan and have made impossible the award to the Pan American Company of the Pearl Harbor fuel storage construction contract.

This is Exhibit No. 103, on pages 393-4 of the record, and it reads—

“We have had some difficulty and delay in the matter of contracts for the construction of storage tanks at Pearl Harbor, for the following reason, to wit: The construction companies have no use for oil and can not, of course, take our crude oil and exchange fuel oil therefor. The oil companies, with whom such exchange must be made, are not engaged in such construction work as appears to be necessary to provide the storage at Pearl Harbor. The consequence has been that we must submit for bids propositions to the oil companies, and they in turn must submit bids based upon naval specifications, not only for the purchase of tanks, etc., but also for the purpose of doing the necessary construction by way of dredging, wharfage, excavation, cement work, etc. Our proposition, therefore must necessarily involve a profit on the construction to be made by the oil company in addition to any profits in oil exchange. If we were in a position to effect the oil exchange, upon the one hand, and having established a credit, to use the cash derived from such credit with which to make our own contracts, we would thus save the profits which will be made by the oil companies.

“For the reasons above given I have drawn a proposal amendment to be attached to line 8, page 25, of the naval appropriation bill (or to be attached to any other proper paragraph in said bill), which amendment reads as follows:

‘Provided further, That storage of fuel oil from naval oil reserves may be provided either by exchange of oil for such storage or (and) by sale of royalty oil in sufficient amount and the

payment of the proceeds thereof for such necessary storage facilities'—

“And a copy of which I am handing you.

“You will note that the amendment by its terms recognizes our right to obtain storage through exchange of oil, but further authorizes us to sell royalty oil and obtain storage with the proceeds of such sale. If adopted, this will save a great deal of trouble, and in the present cases which we are considering might save the Government several hundred thousand dollars—possibly half a million dollars.

“I am therefore holding up the proposed contracts indirectly by taking abundant time for the consideration of bids, etc., with the hope that meantime this amendment may be adopted and that we may obtain the results suggested by the large saving which I am confident will accrue.

“If you agree with me in this matter, would you have the amendment presented to Mr. Kelly with your approval? I am confident that should you see your way clear to take such action the Congress would unhesitatingly adopt the amendment. It may or may not be necessary to go fully into the details of what we are trying to do at Pearl Harbor; of course, impressing Congress with the view that too great publicity should not be given to the subject.”

Had the Navy Department adopted the suggestion thus made by Secretary Fall, the whole plan as it existed at that time must necessarily have been abandoned. A new plan would have inevitably followed, under which construction companies, who it may be assumed as a rule had no facilities to dispose of oil, could have offered to contract for the construction of the Pearl Harbor storage project and be paid in cash, which cash the Navy would be then authorized to thus expend when it received the same from sales made by it of Naval royalty oil.

The Standard Oil Company were urging the plan which Secretary Fall thus recommended. The Associated Company wanted additional legislation—and

Secretary Fall recommended it. Defendants had made no such suggestion.

The Court will not forget that the Bill in this case charges, and the District Court found, that months prior to the writing by Fall of his April 12, 1922, letter, he and Doheny had agreed that the contracts in issue in this case would be awarded the defendant companies.

The action proposed by that letter is so utterly inconsistent with the conspiracy charged in this case that argument to so show would be superfluous. That letter was the subject of discussion between Secretary Denby and Admiral Robison and they concluded that if bids were coming in within three days they would wait to see the result before taking any action on Secretary Fall's letter. If bids were not then received, it would be time enough to act, but if bids were received, then Mr. Fall's views of the situation would be shown to be pessimistic (R. v. II, 1002; v. III, 1089).

Mr. Fall left Washington on April 13, 1922:

"Prior to the time when Secretary Fall left Washington on April 13, 1922, he did not say anything to Admiral Robison about who this contract was to be awarded to, nor did any one in the Interior Department say anything to him prior to that time about who this contract would be awarded to" (R. v. II, 1009).

No instructions whatever were given to Dr. Bain (R. v. II, 775) at the time when bids were opened on April 15, and the same were turned over by Secretary Finney to Bain and Ambrose for study

"or at any time prior as to what the report should be and no instructions whatever, that he knows of, of that kind, were ever given to Mr. Ambrose; * * * witness certainly did not give Ambrose any instructions with regard to whose bid he should recommend, and Secretary Finney did not give any such instructions to his knowledge, nor in his presence, nor did any one else to the witness' knowledge" (R. v. II, 776).

After bids had been opened on April 15 Judge Finney

“turned over all the proposals to Dr. Bain and Mr. Ambrose, with instructions, in substance, to examine them carefully, make an abstract of them, and return them to the witness with a report and recommendation; he did not tell Dr. Bain or Mr. Ambrose, or give them any instructions, about what their recommendations should be; he had at that time no instructions whatever from Secretary Fall as regards what their recommendations should be; he had not prior to the time Secretary Fall left Washington on April 13, 1922, received any instructions from him as to what consideration any of these bids should receive; it is a fact that when Secretary Fall left Washington he left in the hands of the witness (Finney) and Dr. Bain the matter of opening these bids and giving them consideration without any restrictions being placed on the witness and Bain at all” (R. v. II, 515).

Ambrose, thus acting in accordance with his untrammelled judgment, made in writing a detailed analysis of the proposals and “recommended that proposal B, of the Pan American Petroleum & Transport Company be accepted for” reasons which he sets forth (R. v. I, 412, 417).

Denby so directed on April 17th (R. v. II, 1005; v. III, 1099).

Then the first word regarding those bids went from Washington to Fall by telegraph in this language (R. v. I, 419):

“California Reserve bids received and opened Saturday. Standard bid was for exchange only. Associated bid for oil in No. 2 Reserve only, six million two hundred one thousand nine hundred barrels. Pan-American bid oil from both reserves, six million ninety-two thousand seven hundred barrels, with an alternative Pan-American bid, five million eight hundred seventy-eight thousand nine hundred barrels, if given preference for drilling required by government in future in Reserve No. 1. Pan-American bid also advantageous, in that it provides for reduction in cost in case

storage facilities erected for less money than estimated. In opinion Ambrose, Robison, and myself, Pan-American alternative bid best offered and should be accepted.

"Referring telegram Safford and myself this morning, regarding Kendrick's resolution. Similar demand for report had been made upon Secretary Denby. Denby desires complete publicity Navy Department's part in opening naval reserve. Suggest you authorize closing contract with Pan-American. Details will require approximately three or four days to arrange. On conclusion this contract suggest you publish complete information concerning opening all reserves. In any event, suggest you telegraph your desires to Secretary Denby at once.

"If you agree with recommendation regarding California Reserve why not authorize me by wire to make award, and yourself immediately make public the entire disposition of all naval reserve contracts, with reasons therefor.

FINNEY,
SAFFORD."

And the lack of domination or attempt thereat upon Secretary Fall's part is evidenced by his reply from Three Rivers dated April 18, 1922, which is Exhibit No. 121 on page 420, and so far as it pertains to this matter reads (R. v. I, 420):

"Telegram No. 2 reference California bids, if Admiral Robison and Secretary Navy think best close immediately on basis Pan-American deal and if authorized by Denby proceed immediately award and close contract and make public entire policy in fullest and completest manner. . . .

FALL, Secretary."

On April 18, 1922, notice of award of contract, on the basis of alternate bid B, was given in writing to the Transport Company by Judge Finney (R. v. I, 421-2), Secretary Denby, as we have seen, having already so instructed, through Admiral Robison, on the 17th (R. v. II, 1005; 1003-4; v. III, 1099). The same

day this was publicly announced through the press (R. v. II, 519).

And next day, April 19th, Assistant Secretaries Finney and Safford sent a telegram to Mr. Fall, in which they said, on this subject:

“Awarded California Oil exchange contract to Pan-American Oil Company, lowest and best bidder; contract will be ready for execution tomorrow” (R. v. II, 524).

Mr. Cotter for the company insisted that the Secretary of the Navy must be a party making the contract on the part of the United States, otherwise the company would not accept the same, and on April 20, 1922, Messrs. Finney and Safford so telegraphed Mr. Fall (R. v. II, 525), who replied by telegraph on April 22, 1922 (ib. 526), that he thought “it very well make Secretary Navy and Secretary Interior both directly parties to contract with Pan-American.”

The District Court erroneously states in the 63rd and 64th findings that Mr. Ambrose was instructed to consult Mr. Fall on Ambrose’s arrival at Three Rivers on the question whether Secretary Denby should be made a party to the proposed agreement and that by telegram dated April 23rd Fall consented. The documentary evidence, in the shape of this telegraphic correspondence, certainly is not only not capable of dispute, but counsel for the plaintiff stipulated that the same

“actually took place between the parties and that the times indicated in said exhibits are correct” (R. v. II, 527).

All that Fall had had before the morning of April 20th was that represented by the telegram telling him what the bids were and conveying the views and strong recommendations of Finney, Safford, Robison and Ambrose, and the telegram of the afternoon of April 19th which told him that contract had been awarded.

All that Fall had done was to refer the matter, without the slightest recommendation or intimation of his

views or desires, to the Navy Department, the only directions he gave were to his assistant at Washington to make the award if the Navy said so.

It was on the morning of April 20th that Finney and Safford telegraphed that the Pan-American had raised the question that the Secretary of the Navy should be made specifically a party in and to the contract (R. v. II, 525).

It was on the 22nd that Fall answered that telegram in the language we have quoted (R. v. II, 525-6).

It was late in the afternoon of April 20th when Fall was telegraphed that Ambrose was coming to Three Rivers, arriving there Sunday or Monday (R. v. II, 526).

It was on the 23rd that Fall telegraphed—

“Ambrose arrived. Have consulted reference all contracts. As to both contracts go ahead” (R. v. II, 526-7).

Secretary Finney testified:

“that before Ambrose ever arrived at Three Rivers on April 23rd every question with respect to who should be a party to that contract and with respect to the awarding of the contract had been settled in this telegraphic correspondence” (R. v. II, 528).

Mr. Finney adds his opinion that “It could have been unsettled by the Secretary.” But our comment upon that is, first, that it was not unsettled; and second, that Mr. Finney’s expression of opinion is of no moment in the circumstances; and, third, that it is an erroneous opinion. Here, however, we are dealing with the facts and the facts are that all that Mr. Fall did was, if we may use a colloquialism, “to put it up” to the Navy, he himself settling nothing, advising nothing, suggesting nothing, recommending nothing, influencing nothing; and not even attempting to do any of these things.

The April 25th contract and the letter accompanying it, which was the basis for the June 5th lease, was

signed at Washington on the date thereof by Acting Secretary Finney, and in the circumstances already shown this court, by Secretary Denby, who it will be remembered had directed personally and expressly that Pan-American alternative bid B should be accepted.

We have now reviewed every bit of evidence that there is with respect to Secretary Fall's connection with the negotiations leading up to, and with the execution of the April 25th contract.

Does not the evidence indubitably show that Fall neither requested, recommended or influenced, much less directed or dominated or controlled the making of that contract?

He turned over to Finney and Bain the handling of such assistance as the Interior was to the Navy in the matter, and he left to the Navy, without the slightest suggestion from him, the entire matter of the award of this contract.

SECRETARY FALL'S PART IN THE JUNE 5, 1922, LEASE.

Secretary Fall took no part in the negotiations for this. He was not in Washington where it was negotiated.

There is no evidence that he had the slightest knowledge prior to April 23, 1922, if then, that Mr. Cotter for the Transport Company had urged the assurance which resulted in this lease. The subject was not mentioned in the telegraphic correspondence. It was not even shown that Mr. Ambrose, who arrived at the home of Secretary Fall, Three Rivers, N. M., April 23d, had with him a draft of the letter subsequently written as of April 25th from Secretary of the Navy Denby and Acting Secretary of the Interior Finney to Mr. Cotter (R. v. I, 423-4). While the testimony is that Ambrose knew of, and was instructed by Mr. Finney regarding, the contemplated action represented by that letter, there is no evidence as regards what, if anything, he communicated on the subject to Mr. Fall or what Mr.

Fall ever knew, if anything, about it. It is attempted to be inferred from the reference in Mr. Fall's April 23rd telegram to "both contracts" that he referred to the April 25th contract and to the letter. This is not clear as he might very well have been giving instructions with regard to the Teapot Dome or some other contract. Mr. Ambrose was available, indeed under subpoena as a witness for the plaintiff, and it must be presumed that if it could have been shown that Mr. Fall knew anything about the assurance out of which the June 5th lease grew there would have been evidence offered of that knowledge. The failure of the plaintiff to call Ambrose, after having subpoenaed him, is significant.

On June 5, 1922, pursuant to the authority in the letter in which Secretary Denby had joined, Assistant Secretary Finney executed the lease. There is no evidence that Mr. Fall was consulted about or knew of this action.

The fact that lease of Naval Petroleum Reserve lands was signed for the Government by an Assistant Secretary of the Interior was held immaterial, provided its execution was authorized by the Secretary of the Navy, in *United States v. Belridge Oil Co.*, No. 4782, decided by Circuit Court of Appeals, Ninth Circuit, July 12, 1926, not yet reported, affirming similar decision of the District Court, Southern District of California, Shepard, D. J., July 17, 1925, unreported.

SECRETARY FALL'S PART IN THE DECEMBER 11TH CONTRACT AND LEASE.

Let us proceed to examine what Fall did in the way of "dominating" the negotiations which eventuated in the December 11th contract and lease.

From April 25, 1922, to November 29, 1922, Fall took no steps toward the making of any additional contract with, or the granting of any lease to, defendants.

Prior to November 29, 1922, Fall had no knowledge

of any plan of the Navy for an enlargement of the Pearl Harbor Reserve fuel resources or the making of a lease to any of the unleased portion of Naval Reserve No. 1, or to any part of that, or any other, reserve to the Pan American Company.

Some time in October and again about November 6, Mr. Doheny submitted to the Navy Department and to the Interior Department his two memoranda seeking a lease to specified sections in Naval Reserve No. 1, ranging from a minimum of four sections to a maximum of nineteen sections in consideration of the undertaking of the construction of a pipeline from the Naval Reserve to tidewater and the rendering of other services in connection with keeping up to 4,000,000 barrels of fuel oil in storage at specified points on the Atlantic and Pacific seaboards subject to the Navy's future call.

These memoranda made no suggestion concerning and in no way contemplated either, first, an extension of the Pearl Harbor storage project, or, second, a lease to all of the reserve.

Mr. Fall's disposition of the first memorandum was that he handed it to Dr. Bain, saying—

“‘take it up with the Admiral’; that is, Admiral Robison, and he did not say anything more on that subject at that time. The witness (Bain) did take that paper up with Admiral Robison.” (R. v. II, 789.)

Fall's disposition of the Interior's copy of Doheny's second, or November 6th, memorandum was this:

“Mr. Doheny's second memorandum came to Dr. Bain through the Secretary's office; * * * Witness (Bain) received instructions with respect to the subject matter of that memorandum from Secretary Fall, which instructions were to do nothing except as the Navy wanted it done; the Secretary at this time further said that it was Navy business; witness did not take this second memorandum up with anybody, but waited for the Navy to take it up with him.” (ib. 790.)

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Government counsel stressed the evidence showing what occurred between Fall and Robison about the subject of the first Doheny memorandum, the evidence on this point coming from Admiral Robison, as follows:

"Admiral Robison testifies that when 'this proposition was originally brought to' his attention, 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details; witness does not remember exactly what, if anything, Secretary Fall said with regard to the Navy's interests or part in that matter, but there was no question that it was a matter for Naval decision." (R. v. II, 1021-2.)

And—

"Witness does not know whether Secretary Fall had before him a copy of Mr. Doheny's memorandum when Secretary Fall discussed Mr. Doheny's plan in the autumn of 1922 with witness. * * *

"The plan for increased storage facilities was purely a naval matter, but Secretary Fall did say to witness when he discussed Mr. Doheny's plan with regard to naval reserves that he thought that plan was valuable both to the Navy and to Mr. Doheny, or would prove valuable to both of them. He was of the opinion that the suggestions offered by the Pan American Company through Mr. Doheny were not without merit from the Government's point of view." (R. v. III, 1137.)

The next thing which came to Fall on the subject of a new contract and lease is the letter from Secretary Denby dated November 29, 1922, written in the circumstances we have already presented to this court, re-

questing the assistance of the Interior Department in connection with a proposed supplementary or new contract for the greatly increased storage facilities at Pearl Harbor. (R. v. II, 616.)

Secretary Denby's letter went to Director Bain and Bain and Ambrose working, as he testified, directly under Robison, doing what the Navy wanted and in all things supporting and assisting Robison, took part in the negotiations which followed. Robison, when the letter of November 29th was written, telephoned the New York office of the Pan American Company to send down representatives to take up the matter.

Not until, at the earliest, December 7, 1922, did Fall have any contact whatever with these negotiations and then, the negotiators having agreed on everything except the schedule of royalties and Bain and Ambrose having prepared data on that subject, Bain saw Fall with this data and the two worked out an intermediate or compromise set of royalties as being one which perhaps could be agreed upon, which Fall directed Bain to submit a copy of to Robison and to Doheny through Cotter. Bain gave a copy of that set of royalties "to Mr. Cotter and told him to take it up with Mr. Doheny." (R. v. II, 794.)

Mr. Doheny evidently understood from Mr. Cotter that this schedule of royalties was offered his company by the government, for under date of December 8, 1922, he wrote Secretary Fall (R. v. II, 619) that his company, after consideration had "decided to accept the government schedule of royalties as offered."

Fall immediately wrote Robison on December 8, 1922 (R. v. II, 796), a letter in which he shows—

First: that the government had not offered Mr. Doheny's company any schedule of royalties;

Second: that he presumed Doheny was referring to the schedule which Fall's letter said he had prepared but which, as a matter of fact, as shown by Bain's evidence, was prepared by Bain and Fall on the basis of the data presented by the former; and

Third: that the only purpose of that schedule at the time was as affording a ground of discussion.

Fourth: That—

“Unless these royalties are entirely satisfactory to you and unless the draft of the contract in other respects is entirely satisfactory, I will immediately notify Colonel Doheny of your conclusions.”

“I will not agree to nor sign any contract whatsoever in the way of a modification of the existing contract or otherwise which is not in every particular satisfactory to you, as you have been designated by the Secretary of the Navy to represent him personally in this matter.” (R. v. II, 797-8.)

Having received that letter, as we have already seen, Admiral Robison, after obtaining Secretary Denby's instructions (R. v. III, 1032), called on Secretary Fall, to discuss the matter with him, and Fall told Robison to go ahead directly and get the best he could from Doheny.

We need not repeat the review of the evidence showing the direct negotiations which followed between Admiral Robison and Mr. Doheny, the other persons present being Bain, Ambrose, Cotter and Anderson, and the agreement reached directly by Robison representing the Government, then having express and specific authority from Denby to act, and Doheny, representing the defendants.

The contract and lease were prepared for the signatures of the Secretary of the Interior and the Secretary of the Navy, and all of the testimony regarding their execution by the former comes from Director Bain, who testified:

“Witness was present at the time the contract was signed by Secretary Fall; this was done in the Secretary's office, there being present Mr. Doheny, Mr. Cotter and Dr. Bain. Dr. Bain presented the contract and lease to Secretary Fall. It had previously been signed by Mr. Doheny in the office of the witness; when witness presented it to Secretary Fall, he told the Secretary this was a

contract that had been worked up; the Secretary at that time, to the witness' knowledge, had seen the letter of December 11 from Admiral Robison, last above quoted; Secretary Fall had not seen the contract or any draft thereof prior to that time; when the drafts were presented to Secretary Fall, he read the same through carefully, he asked if it was all right, addressing the whole party; witness answered that it was; Admiral Robison was not there, so far as witness recollects; Mr. Fall signed the contract and lease and the same was taken down to the Navy Department by Mr. Cotter." (R. v. II, 801).

TO SUMMARIZE, AS TO SECRETARIES DENBY AND FALL.

We now have reviewed the entire record, so far as there is anything in it, as to the negotiations of and the execution of these contracts.

On that record, may we not say that, if Denby did not **make** these contracts and did not know their contents, then in the language of a United States Judge he was an "imbecile."

If on that record Fall dominated the negotiations that eventuated in the contracts and leases in suit, then "domination" has a meaning no lexicographer ever dreamed of.

We have shown by the evidence, and all the evidence on the subject, just how the agreement was reached directly by Mr. Doheny for the defendant company and Admiral Robison for the Government as to the royalties which were incorporated in the December 11th lease.

We have shown by the evidence, and all the evidence on the subject, that the proposition to lease the entire unleased portion of the reserve, in connection with the December 11th contract, or for that matter in any connection whatever, originated with and came solely from Admiral Robison.

We have shown that there is absolutely no evidence to show that Secretary Fall recommended, requested or

directed the Navy Department or any one else to grant a lease to the reserve or to one foot of property in the reserve to the defendant company or to any other person or persons whatsoever at any time after November, 1921.

We cannot overemphasize the fact that these things are not the subject of any conflicting testimony whatever.

THE GOVERNMENT'S ANSWER—AND OUR RESPONSE.

In effect counsel for the Government say that, admitting all that we have stated, the schedule of royalties in the December 11th lease was fixed by agreement between Doheny and Fall, dealing directly, and was not fixed as shown by the evidence as above presented to this Court. For this they rely entirely upon the testimony of Robison and Bain.

It will be recalled that Anderson, one of the negotiators for the company, and Robison, negotiating for the Government, disagreed on the question of royalties. Anderson at first sought a flat royalty of $12\frac{1}{2}\%$. During the negotiations he agreed to accept a lease containing what are known as the Interior Department regulation royalties, promulgated under the Act of February 25, 1920, on a sliding scale of $12\frac{1}{2}\%$ to 20% for one grade of oil and $12\frac{1}{2}\%$ to 25% for another; Admiral Robison wanted to start at 14 2-7% and go up to 30 and 35%, according to gravity. Dr. Bain and Mr. Ambrose, then and thereafter, to use the language of the testimony, were supporting Robison, "as we were acting for the navy" (R. v. II, 793). They collected data as regards royalties which the Government was actually receiving from its various leases and Dr. Bain went to Secretary Fall's office with the sheet and statements on that subject and talked the matter over with him,

"and then he and witness worked out an intermediate or compromise set of royalties as being a fair basis, and one which perhaps could be agreed

upon. These were worked out in pencil and type-written copies made in the Secretary's office; Secretary Fall instructed the witness to take that up with Admiral Robison. He also, either at witness' suggestion or at his own, or it was agreed, that witness should give a copy to Mr. Cotter, and he would see if Mr. Doheny would take it up; * * * witness did take the copies downstairs and gave one to Mr. Cotter and told him to take it up with Mr. Doheny, while the witness took it up with the Admiral." (R. v. II, 794.)

In face of that Government counsel contend that while Bain was to take it up with Admiral Robison Secretary Fall took up these compromise royalties with Mr. Doheny personally and got the latter to agree to them.

It is true that Robison in a subsequent conversation so understood from Fall but there is no evidence of the fact of what was done (as distinguished from Robison's recollection of what Fall told him) except, first, Bain's statement that through Cotter it was presented to Doheny. What followed shows quite plainly that when Mr. Fall told Admiral Robison he had taken it up with Mr. Doheny he meant exactly that, the fact being that it was taken up with Mr. Doheny in the way Bain testified.

We say what follows shows this and destroys the claim that Doheny and Fall, dealing personally and directly, agreed upon the royalties, for the evidence as to this does not depend upon any witness' recollection two years after the event of what he understood another to say, but upon contemporaneous writings.

After there occurred what Bain testified to Doheny wrote to Fall his letter of December 8th. It is obvious he was thus replying to the information brought him by Cotter and even that he misunderstood that information and construed the schedule of royalties as being one offered by the Government. That letter, in part, states:

"We have given very careful consideration to the difference between the royalty schedule which the Government has offered us in the lease connected with the proposed modification of our Pearl Harbor contract and the changes in such schedule which we had proposed to request of the Government. Realizing, as we do, that the value of this contract depends largely upon better prevailing prices for crude oils than at present obtains, we have concluded that the possible appreciation in the price may be made to absorb the difference between the schedule of royalties offered and that which we had proposed to request, with the result that we have decided to accept the Government's schedule of royalties as offered." (R. v. II, 619.)

The plaintiff offered the above in evidence but refrained from putting in evidence the action taken by Secretary Fall when he received that communication. The defendants supplied that omission from the Government's files.

Fall sent Doheny's letter immediately to Robison with a communication (R. v. II, 796) from which we have quoted hereinbefore.

As against the claim that they had personally discussed and settled the matter between them, we find Fall's letter of December 9th showing that when Doheny in his letter of December 8th spoke of royalties "which the Government has offered us" he, Fall, could only "presume" that Doheny had reference to the tentative schedule of royalties the only purpose of which was to afford ground for discussion on the then open subject.

And what did Fall do after that letter? He sent it to Robison without recommendation.

What contribution did Fall make to the agreement after that letter? The answer is, from the only evidence on the subject, that he told Robison to go and negotiate directly with Doheny and Robison did so.

Bain and Robison both testified unqualifiedly to that fact and no one testified to the contrary. The record

shows that Mr. A. W. Ambrose was present when Robison and Doheny negotiated for and agreed upon the schedule of royalties. Ambrose, a Government official, never made the subject of any charges, a presumably honest man, was subpoenaed in this case by the plaintiff's counsel (R. v. I, 103), but was not called to the stand.

We call attention to the fact that neither by oral nor documentary evidence is there a scintilla of proof that Fall recommended or requested that the schedule of royalties in the December 11th lease be agreed upon. He and Bain did get up a schedule which was thereafter agreed upon by Robison and Doheny. But the evidence is clear that they got it up as a thing to be discussed and that when gotten up one copy was turned over to the Navy's representative, the other copy was turned over to the defendant company's representative, and subsequently in direct negotiation the representative of the Navy, having first gone to Secretary Denby and gotten his authority thereunto, dealing directly out of Fall's presence and without any influence or urging from Fall, reached an agreement with the representative of the defendant companies.

We submit that plaintiff's desperate attempt to show that the Secretary of the Navy did not make this agreement, but that Secretary Fall did, cannot succeed.

FALL'S DECLARED INTENTIONS AND FALL'S ACTUAL ACTIONS.

Great stress was laid by counsel for the Government and by the trial judge on language used in a letter written by Secretary Fall to Mr. Doheny July 8, 1921, at a time when Mr. Fall was thanking Mr. Doheny for the action of the latter in agreeing to surrender part of a lease which the Petroleum Company had become entitled to in open competition, which surrender was in order to enable the Government to settle a claim of the United Midway Company. At that time the conflict between the Interior Department and certain naval offi-

cials to which we have referred existed and Fall concluded his letter by stating:

"There will be no possibility of any further conflict with the Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matter of naval leases under the direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau in his department, but only with himself" (R. v. I, 135).

The trial court quotes that letter in full in his opinion (R. v. III, 1299-1301) and of it says (*ib.* 1301):

"The contention of defendants that the leases in suit were the work of Secretary Denby and that Secretary Fall acted merely as his agent is utterly devoid of merit when considered in the light of his ultimatum in this letter"

That letter was written in July, 1921. It is relied upon by plaintiff's counsel and treated by the trial court as though the intentions therein set forth were actually followed out, and the testimony showing that, from the time Admiral Robison was appointed as Secretary Denby's representative in charge of naval fuel matters, no such course of conduct was pursued is entirely ignored.

The contracts in suit were made in 1922.

Let us compare what Secretary Fall *said* in July, 1921, with what he subsequently *did*.

October 18, 1921, Robison becomes Denby's representative.

October 25, 1921, Denby writes Fall—

"Rear Admiral J. K. Robison reported to me that as a result of his interview with you on Saturday, October 22, the following general agreement in connection with the naval petroleum reserves was reached" (R. v. I, 146).

October 30, 1921, Fall writes Denby—

"I have your letter of October 25 and have just consulted Admiral Robison about the subject matter. Responding to your request for information as to whether the policies set forth in the letter are agreeable to the Department of the Interior, I can say without hesitation that they are entirely agreeable and will be carried out to the very best of my ability. Of course, should any new matter come up at any time I will unhesitatingly and immediately consult you personally or through Admiral Robison" (R. v. I. 149).

November 29, 1921, Fall writes directly to Robison, transmitting Doheny's letter of November 28th and saying:

"If you approve the proposition, will you kindly indicate to me such approval by simple endorsement upon Col. Doheny's letter to myself, signed by yourself. Your simple O. K. will be sufficient" (R. v. I, 164).

April 18, 1922, Fall telegraphs from Three Rivers, N. M., to Assistant Secretaries Finney and Safford:

"If Admiral Robison and Secretary Navy think best close immediately on basis Pan-American deal" (R. v. 420).

October, 1922, when Mr. Doheny sent in his memorandum on the California oil situation to Admiral Robison and to Secretary Fall, Fall turned it over to Dr. Bain with instructions to—

"take it up with the Admiral; that is, Admiral Robison" (R. v. II, 789).

When there was received at the Interior Department copy of Mr. Doheny's November 6, 1922, memorandum, Fall turned it over to Dr. Bain with—

"instructions with respect to the subject matter . . . which instructions were to do nothing except as the Navy wanted it done; . . . that it was Navy business" (R. v. II, 790).

December 8, 1921, when Mr. Doheny indicated his company's willingness to accept in the lease then under negotiation schedule of royalties gotten up by Fall and Bain as a tentative basis for discussion, Fall immediately transmitted Doheny's letter directly to Admiral Robison by a letter concluding—

"I will not agree to nor sign any contract whatsoever in the way of modification of the existing contract or otherwise which is not in every particular satisfactory to you, as you have been designated by the Secretary of the Navy to represent him personally in this matter" (R. v. II, 797).

December 8, 1922, Secretary Fall and Admiral Robison had a conversation on the subject of lease royalties in which the Secretary turned over the whole matter for direct negotiation to Admiral Robison, the latter having stated that he wanted the schedule to begin with a one-seventh royalty for a minimum, Fall saying to Robison:

"Go ahead and see if you can get it out of the old man. I can't" (R. v. III, 1031).

We shall not reiterate references to the record showing not only the constant consultations of Interior Department officials with Admiral Robison and other representatives of the Secretary of the Navy, but their entire subordination to the Navy Department.

To quote Robison on cross-examination, the

"man who was important to witness was Secretary Denby. The rest of the people were tools. . . . Witness means the master of the Interior Department was a complete tool of witness's. They were all under witness's hand in naval matters" (R. v. III, 1087).

And the record teems with evidence so showing.

What we have here reviewed suffices to show the utter immateriality of any statement by Fall of his expectations or intentions in July, 1921, on this subject in the light of what actually occurred thereafter.

It is true Fall said *he would not consult* with Navy

officials about naval reserve leases. It is equally true that thereafter *he did consult* with Navy officials.

Had he said he would not resign, and then resigned, the plaintiff here would contend that he had not resigned because he said he would not.

Had he said in 1921 he would go to Europe in 1922 and in fact did not leave the United States, the plaintiff would have pointed to his 1921 declaration as proof that he was in Europe in 1922.

Having said in 1921 that he would not consult with Navy officials, at a time when there was conflict between his department and a subordinate of the Navy who seemed not to have been able to get on with Interior Department officials under either of the last two administrations, the District Court and counsel for the Government say that it necessarily follows that Fall did not consult with Navy officials and that the Secretary of the Navy did not make the contracts here in issue.

MR. DOHENY'S LETTER OF NOVEMBER 28, 1921, TO
SECRETARY FALL.

But the Government contends that all of the foregoing is overcome by the fact that the first proposition to exchange royalty crude oil from the reserves for fuel oil and tanks therefor at Pearl Harbor was addressed to the Secretary of the Interior by the President of the Transport Company November 28, 1921 (R. v. I, 163). We have said we would discuss this in detail. We proceed to do so.

It is to be noted at the outset (a) that the information transmitted in the letter of November 28th from Mr. Doheny to Mr. Fall had been sought by the latter as the result of a conversation with Admiral Robison in which the Admiral asked Mr. Fall to "get some figures" to show what it would cost the Navy for commercial tank installation, in view of a discussion regarding the higher cost of Navy over commercial tankage (R. v. II, 970); and (b) that no action whatever

was taken on the November 28th letter other than its reference by Mr. Fall to Admiral Robison who took no action on it. The District Court considered it significant that defendants had made inquiries of builders of oil tanks before the letter of November 28th was written. It does not appear how else an oil company could have replied to an inquiry regarding the cost of constructing such tanks and as will be observed from the language of the letter (*R. v. I*, 162), the first line states that inquiries had been made regarding that cost.

Let us examine this much considered but really unimportant letter and trace it in the Interior and Navy Departments.

In substance it advises Secretary Fall that in response to his suggestion Mr. Doheny had made "some inquiries" regarding the cost of constructing tanks for storage at Pearl Harbor and finds that the price of 27 tanks, with an aggregate capacity of 1,485,000 barrels, not erected but simply delivered at ship's side, Hawaii, would be \$538,920; that the cost of that quantity of fuel oil delivered at Pearl Harbor would be \$2,821,500; and he adds—

"Therefore, were we to construct the tanks and furnish the oil on the basis of our being paid for both tanks and oil in royalty crude oil produced from lands within the naval reserve and to be leased to us, it would require a return to us in royalty crude valued at \$3,360,420, or 2,973,823 barrels, figured at today's price" (*R. v. I*, 163).

He concludes that he will have Mr. Cotter discuss the matter with Mr. Finney who he assumes, with Rear-Admiral Robison, will arrange the details.

It is insisted by the Government, and it was decided by the trial court, that this letter was—

First: a definite bid on the Pearl Harbor project ultimately embodied in the April 25, 1922, contract;

Second: the foundation and basis for the award of the April 25, 1922, contract to defendant Transport Company.

In the light of uncontradicted facts let us proceed to find the answer to two questions:

First: Was this a bid on the Pearl Harbor project subsequently contracted for?

Second: Was it the foundation of any action, or is it true that no action whatever was ever taken by the Government based on it?

As to whether this is to be held to be a bid on the Pearl Harbor project, the advance submission of which gave any advantage to the Transport Company, these points are to be noted:

1. The letter is dated November 28, 1921. Subsequently bids on that project, including two from the Transport Company, were submitted April 15th, 1922, and contract based on a bid submitted on this last date, and on no other, and without any relation to the figures contained in the November 28th letter, was made April 25th, five months, lacking three days, from the time the November letter was written. No one has explained why, if that was a bid, intended to be and actually treated as such; if it was a proposition actually accepted; if, as Judge McCormick says, at the time it was written Fall and Doheny had tacitly agreed upon the award of the contract to the Transport Company, five months were allowed to intervene before a contract was made.

2. The November 28th letter merely advised, as regards the construction part of the storage facilities at Pearl Harbor, that "some inquiries" made by Mr. Doheny showed that 27 tanks could be delivered ship's side, Hawaii, for \$538,920, the Government itself to pay for transporting the tanks from the ship and preparing the tank sites. Apparently Mr. Fall had simply asked, as Admiral Robison said he had requested Fall to do, for figures showing the cost of commercial tanks.

In the November 28th letter the cost of everything relating to tankage was \$538,920 (R. v. I, 163), whereas the bid submitted April 15, 1922, so far as it cov-

ered construction work alone at Pearl Harbor was for \$3,200,000 (R. v. II, 569).

3. As against merely 27 commercial type tanks delivered at ship's side, the Pearl Harbor project for which bids were sought and received and on which contract was let five months later embraced these items:

- (a) 30 50,000-barrel tanks specially designed by the Navy, with heavier plates than those commercially used, with steel tops and specially specified foundations (R. v. II, 542; 566);
- (b) The preparation by the contractor of the tank sites;
- (c) Construction work incident to building the foundations, the tanks, and erecting the latter;
- (d) The construction of an embankment surrounding each tank (ib. 547);
- (e) A system of connecting pipelines;
- (f) Pump houses;
- (g) Electrical work in conjunction with the operations of the plant (ib. 574);
- (h) A complete steel wire fence around the tank areas (ib. 580);
- (i) A concrete fuel station dock, on concrete piles, for the unloading and handling through pipelines of the fuel oil to be received in the tanks and the bunkering of naval vessels from those tanks;
- (j) Dredging channel so as to make available this dock and through it the storage plant;
- (k) All labor and material necessary from the assembling in this country to the completion of the storage facilities at the naval station in Hawaii.

The cost of the entire project mentioned in the November 28th letter—tanks and oil—would have been \$3,360,420. The project for which proposal B was submitted was to cost \$6,466,795.50.

4. As proved by the plaintiff through its witness, Admiral Gregory, the plans for the project which were actually used were not completed in his Bureau until March 1, 1922, and—

“they were the second set of plans prepared; the first, prepared in December, were found to be so general and to convey so little information of a kind that would be required to submit an intelligent bid, that the Bureau prepared this second set subsequent to the receipt of information from the Pearl Harbor Naval Station as to local conditions.” (R. v. II, 564.)

The making of plans upon which could be made a bid, as Gregory tells us at page 562, required information which was not even in Washington until February respecting (1) conditions of the grounds; (2) the foundations; (3) the depth of water; (4) the nature of the underlying soil; (5) amount that the piles would penetrate; and much other data, to be used (we use his own language) “in informing prospective bidders so that they could intelligently formulate real bids” (ib. 562).

The plans completed March 1, 1922, were sent out with invitations for proposals, under cover of a letter dated March 7, 1922, signed by Judge Finney, to seven substantial companies, four of them being engineering concerns and three oil corporations.

Having these entirely indisputable facts clearly in mind—facts proved by the plaintiff and embodied in official documents—clearly the November 28th letter was not, and was not treated as, a bid on the actual Pearl Harbor project and the District Court’s opinion that it was is erroneous.

We come now to the second question regarding this letter, namely:

WAS IT THE FOUNDATION OF ANY ACTION, OR IS IT TRUE THAT NO ACTION WHATEVER WAS EVER TAKEN BY THE GOVERNMENT BASED ON IT?

And in this connection, was the letter treated as a secret thing to be hidden or was it handled as something without sinister purpose or contents?

The answers to these propositions are to be found in uncontradicted evidence.

Let us trace that letter by this record:

(1) It was sent openly through the mail, addressed to the Secretary of the Interior (R. v. II, 505).

(2) It was received by Assistant Secretary Safford of that department. (ib.)

(3) It was routed by Safford to First Assistant Secretary Finney. (ib.)

(4) Secretary Finney "returned it either to Safford or to the Secretary, probably to Safford." (ib.)

(5) It was immediately transmitted by Fall to Admiral Robison in the Navy Department,—four months after Fall had declared he did not intend to consult any officer of the Navy. (R. v. I, 163-4.)

(6) The Doheny letter was taken by Robison, on the day of its receipt by him, into the meeting of the Navy Council, as we have already seen, on November 29, 1921, and the construction that Robison put upon it as being in effect an assurance that the Navy could get storage facilities in exchange for crude oil was there the subject of discussion (R. v. II, 975-6).

(7) Neither Robison, Denby, nor any one else took any action upon the Doheny letter (R. v. II, 506).

(8) Admiral Robison apparently returned it without comment to the Interior Department where it came into the possession of Dr. Bain of the Bureau of Mines along about the 1st of December, 1921, without any instructions (R. v. II, 719).

(9) When Secretary Finney, later in December, turned over to Dr. Bain the request from the Navy contained in letters of December 9 and December 14 for the working out of a plan for the exchange of crude oil for the Pearl Harbor storage, Finney instructed Bain "to try to work out a plan which would accomplish what the Navy wanted" and Bain, having ascertained from the Doheny November 28th letter that this matter was in the hands of Mr. Cotter for the Trans-

port Company, took that November 28th letter to Finney and asked Finney to write Cotter requesting that when he next came to Washington he call on Bain (R. v. I, 342; v. II, 719-20).

There was no other action

"ever taken on the November 28th letter, and from that time on, the same was kept in the files of the Bureau of Mines, where the original remains until the present date" (R. v. II, 720; 505-6).

(10) It was filed in the Bureau's safe with and kept in the same manner as other "papers relating to this case," it being looked upon by Dr. Bain as "an engineer's preliminary estimate of the probable cost," he having later "procured similar estimates from other sources as a guide to him in making up plans for the work" (ib. 720).

(11) Finally Admiral Robison testified that subsequent to the Council meeting of November 29th when

"he announced that he was going to look into the matter and see whether the tanks referred to in Mr. Doheny's letter were specification tanks; * * * he did nothing with reference to that letter; no action was ever taken in the way of accepting that proposition, or any official action on that proposition" (R. v. II, 992-3);

and his only talk about it was with Bain, the extent of which was "'we could not take any such proposition as that' and let it drop at once" (ib.).

And it did drop at once.

Never again does that letter appear in the case.

Never was it referred to by any government official or by any company official.

Never did Fall or Doheny inquire about it.

Never after December 16, 1921, was it referred to by any person in Government or in defendant's services (R. v. II, 505-6).

But it is urged that there is some sinister significance to be attached to the reference in the November 28th letter to future leases. As we shall have occasion

to discuss that point in arguing that no financial transaction between Mr. Doheny and Mr. Fall *had the slightest bearing on the matters in issue* we omit more than a reference to it here. We submit that we have sufficiently shown, regardless of what might have been written by Mr. Doheny to Mr. Fall in November, 1921, that he did not make, direct, or influence the contracts and leases involved in this case.

POINT X.

The Contracts of April 25th and December 11th, 1922, Were Not Invalid Because of Any Illegal Delegation to the Secretary of the Interior of Discretionary Powers Which Could Only Be Exercised by the Secretary of the Navy.

At the trial in the District Court counsel for plaintiff contended that even if Secretary Fall did not make these contracts and leases, which the Secretary of the Interior was not authorized by legislation to make, and even if they were not invalidated by any fraud or conspiracy to which he was party, the contracts were nevertheless void because they contained delegations to the Secretary of the Interior of powers which could only be exercised by the Secretary of the Navy. No such theory was presented by any allegation of the bill of complaint. It was first heard of on the trial.

A. The District Court specified this as the only illegal feature of these contracts (R. v. III, 1390; 1420-1).

B. The Court of Appeals did not allude to this point, or base its decision upon it in any way.

What are the "delegation" clauses which were condemned by the District Court?

1. In the contract of December 11, 1922, the phrase "Secretary of the Interior" is only used three times.

(a) The first of these is a mere reference, in the first recital, to the letter of November 29, 1922, there-

tofore written by the Secretary of the Navy to the Secretary of the Interior, requesting the assistance of the Interior Department in the matter.

(b) The second place in which the phrase "Secretary of the Interior" is used is also in a recital—the next to the last paragraph—referring this time to the preferential right granted in the contract of April 25th, "on such terms and conditions as may be determined by the Secretary of the Interior."

(c) The third place in which the Secretary of the Interior is alluded to is in paragraph one of the contract, and consists of an agreement on the part of the contractor that the delivery of fuel oil under the preceding contract of April 25th (which omitted to specifically provide for the date of such delivery) should be made "when and as directed by the Secretary of the Interior."

Aside from the fact that this constitutes no exclusive delegation of authority to the Secretary of the Interior, the matter is one of purely ministerial significance. Moreover, the record conclusively, and without dispute, shows that delivery of this oil was made when and as directed by the Secretary of the Navy (*R. v. II*, 818). Furthermore, this phase of the contract was entirely executed before this suit was brought.

In the specifications attached to the contract (which being of enormous volume are not printed in full in this record), the Secretary of the Interior is named as the individual by whom a number of acts—involving the exercise of but slight, if any, discretion,—are to be performed (*R. v. I*, p. 429).

If such "delegations" as are contained in these specifications are illegal, the Court must establish a rule that a great executive officer charged with responsibility for hundreds of decisions involving the policy of his department would be required to personally attend to the details of preparing and approving specifications—approving detailed drawings—direct-

ing performance of the work—granting extensions of time—determining what delays are excusable—approving changes in the contract—passing upon violations of the eight-hour law—deciding what officer shall approve special plans—deciding what changes are to be made owing to discovery of changed conditions, and approving items of prices involved in lump sum sub-contracts.

The unsoundness of such a position has been recognized even by counsel for the Government in the argument before the District Court in the *Mammoth* case, because while still contending that clauses in the *Teapot Dome* lease—which involve the exercise of much greater real discretion than the clauses to which we have referred are void, they nevertheless admitted that none of those clauses even though held to be void in itself, could be taken as sufficient ground for annulling the lease in its entirety.

Counsel's statement is quoted by Judge Kennedy (5 Fed. (2d) p. 345):

"Those provisions are void. I must be frank with Your Honor—those provisions, in my judgment, would be severable. In other words, if those were the only illegal provisions of the lease, take them down if you find them illegal, and strike them out, and let the rest of it stand."

Judge Kennedy in his opinion after quoting the above language, said:

"So that until the Interior Department were seeking to exercise affirmative authority in the manner and upon the things purported to be delegated to it, in the leases, no complaint could arise."
(5 Fed. (2d), p. 345.)

Precisely the same state of facts exists in this case.

No question has ever arisen under either of our contract or leases which involves the validity or effect of any "delegated" power, either of the nature of those above discussed, or of any other kind whatsoever.

We submit that there is not a single one of these pro-

visions which can render void upon its face and as a matter of law such a contract as this is.

And this is emphasized when it is remembered that, as a matter of fact, every one of these things were done by officers of the Navy—and exclusively by them (Rec., p. 571).

While in a technical sense there is hardly an act which a man, whether he be a private individual or a public officer, can perform in such a matter as this without some element of "discretion" (i. e., of plain, ordinary common sense) being involved, yet the authorities are clear to the effect that such "discretion" as these items permit is clearly not the kind of discretion which is meant by the prohibition of delegation of discretionary powers.

The discretion which cannot be delegated is the discretion which involves the exercise of original power as to whether or not a public enterprise shall be undertaken.

Such element of discretion as is involved in the performance of merely executive and business acts in relation to the details of the execution of this enterprise does not go to the essence of the matter and is not within any such prohibition.

"The distinction between the exercise of original power involving judgment and discretion as to whether a public enterprise shall be undertaken, and the performance of merely executive and business acts in relation to details and in the supervision of the work, is very well brought out in the case of:

Cass County v. Gibson, 107 Fed. Rep., 363 (C. A., 6th Cir.; Lurton, Day, and Clark, J.), citing

Klamroth v. Albany, 127 N. Y., 575;

Hitchcock v. Galveston, 96 U. S., 341.

This case approves specifically the doctrine of:

Reuting v. Titusville, 34 Atl., 916 (Pa.);

Shea v. Milford, 14 N. E., 764 (Mass.).

The doctrine of the Cass County case has never been overruled by the United States Courts.

To the same effect are:

Dexter & Carpenter v. U. S., 275 Fed., 566;
Biddeford v. Yates, 72 Atl., 335 (Maine);
Filbert v. Phila., 37 Atl., 575 (Pa.);
Woldenberg v. Sampson, 104 Pac., 184 (Wash.);
LeClaire v. Davenport, 13 Iowa, 210;
Decorah v. Dunsto, 38 Iowa, 96;
Mayor, etc., v. Wollman, 91 Atl., 339 (Ind.);
Spiegler v. Chicago, 74 N. E. 719 (Ill.);
Child v. Bowers, 21 Atl. 539 (R. I.);
State v. Milwaukee, 121 N. W., 658 (Wis.);
Re Triangle S. S. Co., 3 Fed. (2d) 896, citing
Cass Co. v. Gibson, and
Hitchcock v. Galveston.

Each of these cases involved the delegation of powers which could only be exercised by the use of discretion.

There can be no doubt under these authorities, we believe, that the meaning of the words "ministerial" and "administrative" is not and cannot be construed as excluding all judgment and discretion. The distinction is now clearly recognized between the discretion as to whether or not the contract shall be entered into, and the steps taken in its formal reduction to writing and in providing for its performance.

We submit:

First. That none of these clauses is void in itself and that they all come within the doctrine of the Cass County case; and

Second. That even if void none of them avoids the entire contract.

So far then as the terms of the contract of December 11th, and its accompanying specifications are concerned, it is submitted that the conclusion of the District Court was untenable; that the contract was and is perfectly valid so far as this ground of attack is concerned; and that as a corollary the lease of the same date, cannot be, as was said by the District Court

invalid because of its relationship to the principal contract.

2. As to the contract of April 25th, 1922:

In this contract (aside from the specifications) there are but four places in which the phrase "Secretary of the Interior" appears.

For reasons outlined in our discussion of the December 11th specifications, no importance attaches to the similar provisions of the April contract specifications.

All of the work done under the April 25th contract was done under direction of the Navy Department and was finally completed and accepted by that Department December 15, 1923, more than three months before this suit was brought (R. v. II., pp. 571, 575). The construction work under the December 11th contract was 95% completed at time of trial, was not ordered discontinued despite the March 8, 1924, letter from Mr. Doheny to President Coolidge (R. v. III., p. 1159), was carried on under the exclusive supervision and direction of the Navy Department, and, prior to the decree herein, was completed to that Department's satisfaction (R. v. II., p. 926, v. III., p. 1197). And "no officer or employee of the Interior Department had anything to do with supervising or inspecting this work" (R. v. II., p. 571).

We proceed to examine the four references to the Secretary of the Interior in the body of the April 25th contract.

(a) The first of these is in Article I, which provides that the Secretary of the Interior may call for a corporate bond at any time when he deems it necessary.

This provision is negligible so far as our present argument is concerned.

(b) We may also dismiss the last clause in this contract in which the Secretary of the Interior is alluded to, this being the provision of Article XII designating the Secretary of the Interior as the person who shall agree with the contractor as to the amount of certain

savings to which the Government might be entitled, etc.

Not a single controversy arose out of the operation of any of these clauses and no issues were pending thereunder when this suit was commenced.

(c) In Article V it is stated that if production shall decrease "to such an extent that the term of this contract shall be unduly prolonged, ~~then~~ the Government will in the discretion of the Secretary of the Interior grant additional leases on such lands as he may designate in Naval Petroleum Reserve No. 1," etc., etc. (R. v. I, p. 31). Separate discussion of this clause is unnecessary because it was never resorted to. We will comment on it in connection with the provision next mentioned.

(d) Article XI—(the so-called preferential right article)—provided that—

"If during the life of this contract future leases shall be granted by the Government within that portion of California Naval Petroleum Reserve No. 1, situated in Townships 30 and 31 south, Range 24 east, Mt. Diablo base and meridian, the contractor shall first be called upon by the Secretary of the Interior to meet such drilling conditions and to pay such royalties as the Secretary may deem just and proper, and in the event of his acceptance of such conditions and of his agreement to pay such royalties, the contractor shall be granted by the Government a preferential lease on such tracts as the Secretary of the Interior may decide to lease. In the event of the failure of the contractor to agree to the conditions and royalties as proposed by the Secretary of the Interior, then said lease or leases may be offered for competitive bidding, but the contractor shall have a right to submit a bid on equal terms with others engaged in such bidding" (R. v. I, p. 34).

With regard to these provisions in Articles V and XI, we ask the Court to note:

1. That whatever may have been originally intended as to the Secretary of the Interior possessing and ex-

exercising discretion in these matters, *as a matter of fact he never did exercise or purport to exercise any such discretion.*

There were never but two leases made after April 25, 1922, covering any portions of Naval Reserve No. 1. The first of these was the lease of June 5th, and the second was the lease of December 11th, both of which are attacked in this suit.

The lease of June 5th was authorized in writing by the Secretary of the Navy in the letter of April 25, 1922, Exhibit E of the amended bill of complaint (R. v. I, pp. 65-68). The lease of December 11, 1922, Exhibit D of the amended bill of complaint, was signed directly by the Secretary of the Navy (R. v. I, p. 65). Neither was made pursuant to any clause in the April 25th contract.

The lease of June 5th was also signed by Acting Secretary Finney, and the lease of December 11th was also signed by Secretary Fall; but while, in view of the President's order of May 31, 1921, these signatures were natural and proper, yet they did not add one jot of validity to the documents to which they were appended, nor would their absence have rendered them one whit less operative and binding upon the Government of the United States.

This is conceded by the courts below, as well as by Government counsel, both of whom—together with ourselves, concur in the statement that the Executive Order did not purport to and could not have transferred to the Secretary of the Interior the discretion as to the Naval Reserve matters vested by law solely in the Secretary of the Navy.

2. Since the leases of June 5th and December 11th, both directly authorized by the Secretary of the Navy, covered the entire area theretofore unleased in Naval Reserve No. 1, the Secretary of the Interior could never, after December 11th, have even purported to have exercised any discretion or power referred to in

the clauses above quoted with respect to Naval Reserve No. 1.

In other words, at the time of the commencement of this suit, and pursuant to the action of the Secretary of the Navy himself, the provisions now under consideration had become completely and permanently inoperative and ineffective.

PARTIES MAY MODIFY CONTRACTS ELIMINATING ULTRA
VIRE CLAUSES.

There is no question but that an executory contract containing a void clause—and by void we mean one which is simply unauthorized and *ultra vires* and not one which is *malum in se* or *malum prohibitum*—may be modified by the parties in such a way that the void clause is no longer operative or of any importance, the rights of both parties thereunder being waived and abandoned.

That is exactly what was done in this case as to these clauses of the April 25th contract, by the mutual act of the defendants and the Secretary of the Navy in making the leases of June and December and the contract of the latter month.

The rights of the defendants under the latter documents have never depended and do not depend in the least degree upon the question of whether the Secretary of the Interior could be delegated or ever acted as the agent to carry out the intent of the preferential right clause.

If, as a matter of fact, he himself alone had made the subsequent leases, relying for his right so to do upon the language of the clause of the April contract, a very different question would have been presented; but from the moment that a different program was adopted and these new agreements were entered into by the Secretary of the Navy himself, who had unquestioned power to make them, the preferential right clause ceased to exist either theoretically or practically.

The subsequent acts above alluded to produced exactly the same effect as though the defendants and the Government of the United States had entered, after the April contract was signed, into a new contract which provided in express words for the striking out and cancellation of the preferential right clause in its entirety from the April agreement. That such an act would have been valid beyond a doubt, our adversaries would not be heard to argue.

And they cannot successfully urge that the lease and contract of December, which not only do not contain the clauses which are assailed but which quash and end them forever as enforceable parts of the April contract, are void as a matter of law for the sole reason that the objectionable clauses originally existed as a part of the preceding agreement from which they had been eliminated by the later one.

Before concluding our consideration of the preferential right and its associate clause in the April 25th contract, we desire to point out that these clauses have by the very acts of the parties themselves been shown not to have been essential and indispensable parts of that contract.

The legal criterion which governs in this connection is that if a clause, although void in itself, is of such a nature that it does not appear that the contract would not have been made without the clause assailed, then the balance of the contract is not affected by any invalidity in the clause itself.

U. S. v. Bradley, 10 Peters, 343;

Navigation Company v. Windsor, 20 Wallace

U. S., at page 70;

Gelpcke v. Dubuque, 1 Wallace U. S., at page 222;

U. S. v. Hodson, 10 Wallace, at page 408;

Reagan v. The Trust Company, 154 U. S., at page 395;

Topliff v. Topliff, 122 U. S., 121;

McCullough v. Smith, 243 Fed. Rep., 823;

Board of Trustees v. Spitzer, 255 Fed. Rep., 126;

In re Johnson, 224 Fed. Rep., 185;
Mack v. Jastro, 126 Cal., 130;
Hedges v. Frink, 163 Pac., 884;
Mathews Slate Co. v. N. E. Slate Co., 122 Fed.
 Rep., 972;
Lincoln Savings Bank v. Allen, 82 Fed. Rep.,
 148.

The doctrine of the foregoing authorities is very strikingly applied in the case of

Burke v. Southern Pacific Railroad Co., 234
 U. S., 669.

In that case the Government issued a patent upon certain lands containing a clause which expressly excepted from the grant all mineral lands which might be included within the boundaries of the territory in question. It was claimed and proven in proceedings brought by a private locator that the lands upon which the grant had been made were mineral lands and therefore were clearly not covered by the patent which on its face did not purport to convey mineral but only non-mineral lands.

This Court held that although the exception in the patent was unauthorized and void, yet that it did not render the entire patent a nullity. The court upheld the grant and disregarded the exception.

Applying that doctrine to the present case, it will be at once seen that the parties themselves are the best judges of the indispensability of any given clause, and in this connection if it appears that the clause in question has been waived or otherwise made inoperative, such waiver or abandonment constitutes one of the best proofs of the lack of importance of the clause itself.

“The parties put a construction upon their agreement which abandoned the *ultra vires* provision, thereby enabling us to say that the condition was not in fact an indispensable one. Of course, it was not intrinsically illegal, *nor may it be said that it was malum prohibitum*. It was simply *ultra vires*; not specifically prohibited. We are

therefore justified to treat the agreement or contract as if this clause were not in it."

Board of Trustees v. Spitzer, 255 Fed. Rep., 136, D. C., N. D., Ohio, 1919.

No comment is needed to point out how perfectly the foregoing statement applies to the case at bar.

In the present instance, however, the record enables us to point to additional proof as to the lack of importance of the preferential right clause, which is the one upon which the Government places its principal, if not its only, reliance. For so far was this clause—which was inserted solely for the benefit of the Transport Company—not considered by it an essential and vital and indispensable element in the contract of April 25th, that even after the bids were opened and up to the day the contract was signed, the representative of the Petroleum Company, Mr. Cotter, urged and pleaded with the Government to disregard proposal B, containing this preferential right, which in its form as modified by the officers of the Bureau of Mines was in his opinion worthless, and to accept proposal A, which contained no suggestion of a preferential right (R. II, pp. 909-10).

Conclusive proof of the attitude of Mr. Cotter and of his company on this point is afforded by the letter of April 25th, signed by Assistant Secretary Finney and by Secretary Denby (R. v. I, 65).

So far as the provisions of Article V are concerned, the court will observe that they constituted nothing whatever but an expression of policy or intention on the part of the Government; that the entire question of whether any further leases should be made or not was left to the discretion of one of the parties to the contract, and that no actual rights of any sort whatsoever were obtained by the contractor thereunder.

The Transport Co. had completed the full performance of all of its obligations under the contract of April 25th, prior to the commencement of this suit (R. v. II, p. 575). At the time the decree was entered

the contract of December 11 had been 100% performed (R. v. III, p. 1427).

“Cancelling an executed contract is an exertion of the most extraordinary power of a Court of Equity” (*Atlantic Co. v. James*, 94 U. S., 207).

In *Illinois Trust and Savings Bank v. Arkansas City*, 76 Fed. Rep., 271, a city had contracted with a corporation for the construction of a water works system and had agreed to pay rentals for hydrants. The franchise was by its terms exclusive of competition.

The city refused to pay rent as provided in the contract upon the ground that the exclusive franchise was void and that therefore the whole contract was void.

The court held, first, that the exclusive feature of the franchise was unauthorized and void since the legislature only could make an exclusive grant of this nature. It also held that if a proper grant had been made to a new company of the right to use the streets for water works purposes, the original contracting company could not maintain a bill to enjoin such proceedings. It then said:

“But these principles and decisions are far from sustaining the position that after this contract has been substantially performed by the gas company, after the water works had been constructed according to its terms, and after the city had accepted and used them for years and has thus secured the substantial benefits of its grant, it can repudiate all the obligations it had the power to assume because it assumed one that was beyond its power. * * * If the gas company stood at the initiation of the execution of this contract defending against its specific performance, on the ground that the city had no power to make its right to use these streets exclusive, that defense might deserve some consideration. But now the gas company has constructed the works. It has executed the contract on its part as far as it has been possible for it to be executed. The exclusiveness of its right to the use of the streets of the city was granted for its sole benefit. If it

does not receive this benefit, the city suffers no loss. The only effect upon the city is that it gets the water works for a less price than it agreed to pay for them. No reason occurs to us why, under this state of facts, the gas company or its successors may not waive the receipt of the exclusive right, and recover the remainder of the consideration which the city promised to pay it. The grant of this exclusive right was neither immoral nor illegal. It was merely *ultra vires*. We know of no rule of law nor of morals which relieves the recipient of the substantial benefits of a partially executed contract from the obligation to perform or pay that part of the consideration which he can perform or pay, because the performance of an insignificant portion of it is beyond his powers. On the other hand, the true rule is, and ought to be, the converse of that proposition. It is that when a part of a divisible contract is *ultra vires*, but neither *malum in se* nor *malum prohibitum*, the remainder may be enforced unless, it appears from a consideration of the whole contract that it would not have been made independently of the part which is void."

This case is cited and followed in *McCullough v. Smith*, 243 Fed. Rep., 823.

In *McPhee & M'Ginnity Company v. U. P. R. R. Co.*, 158 Fed. Rep., 5, a similar situation was presented.

"A contract or obligation which is executed by the promisee and is sustained by a legal and valuable consideration which the promisor had the power to give, may not be voided because the promisor also agreed to give another consideration which it was beyond its corporate power to bestow. The promisee may waive the unauthorized consideration and rely upon that which was within the power of the corporation."

Jenson v. Toltec Ranch Co., 174 Fed. Rep. 91, citing the *Illinois Trust & Savings Bank* case, *supra*.

"Upon principle, where a contract has been fully or in part executed, although *ultra vires* or illegal, but not *malum in se*, nor attended with

criminal liability, it should be enforced as far as executed."

Power Company v. Medford, 226 Fed. Rep., 926 (District Court, Oregon, 1915, Wolverton, D. J.).

Under the foregoing authorities:

1. The Transport Company had a perfect right to waive that part of the preferential right clause which purported to vest the Secretary of the Interior with any discretion—and did so.

2. Both parties to the contract had a perfect right to abrogate and disregard any provisions with regard to the delegation of this authority and to substitute for them a new and valid contract or act—and this they did.

The contract of April 25 being wholly executed on the part of the Transport Company, and no issue or question having arisen under or pursuant to these clauses, which had thus been waived so far as the Transport Company was concerned, and abrogated by the joint action of both parties, it does not lie in the mouth of the Government to endeavor to set aside the entire contract of April 25th—much less the subsequent one of December 11th, as invalid upon this ground. The claim that this latter contract can be avoided because of clauses in the former executed contract we submit is unsustainable.

AUTHORIZED OFFICER MAY RATIFY CONTRACTS MADE, OR CONTAINING CLAUSES THAT ARE, *ULTRA VIRES*.

It is clearly established by the authorities that the act of a municipal corporation which is sought to be accomplished in an *ultra vires* manner, may be validated by the subsequent act of the board or official in which the real power and jurisdiction resides.

In *San Francisco Gas Light Co. v. Dunn*, 62 Cal., 580, the board of supervisors of a city, having full jurisdiction to act, delegated certain discretion to a commission which was appointed pursuant to a certain contract.

It was held by the court that this delegation of discretion was *ultra vires*.

But a subsequent resolution of the board of supervisors themselves, under which a new contract was made covering the same point, was held to be effectual to carry out the desired intent.

While the present case is one in which the clause under attack was abrogated and eliminated, instead of being ratified, yet the principle of the case just cited, to the effect that subsequent action of the duly qualified authorities will do away with any defects in the prior proceedings, is pertinent to our discussion.

In *Hitchcock v. Galveston*, 96 U. S., 341, a similar situation was presented.

There it was urged that the proper municipal authorities of the city of Galveston had acted *ultra vires* in delegating certain powers to the mayor and other officials.

This Court did not agree that this delegation was *ultra vires*, but considered the matter placed beyond question by the fact that the contract was thereafter ratified by the municipal council after it was made.

CONTRACTS VOID IN PART NOT WHOLLY VOID.

No authority known to us holds that a promisor who has made a promise which is not *malum in se* or *malum prohibitum*, but is merely claimed to be void because of the application of the *ultra vires* doctrine, can maintain an affirmative suit to set aside an entire contract merely because such a clause is a part of it.

In much the greater number of the authorities involving this question, a specific issue is raised as to the validity of a given act which has either been done or is about to be done pursuant to the delegated power.

Of this class was:

San Francisco Gas Light Co. v. Dunn, 62 Cal., 580;

(in which, however, as above shown, the court held that the defect was removed by the subsequent act of the board of supervisors).

Mann v. Richardson, 66 Ill., 481;
Milarky v. Cedar Falls, 19 Ia., 21;
Matthews v. Alexandria, 68 Mo., 115;
Gale v. Kalamazoo, 23 Mich., 343;
Clarke v. The Mayor, 12 Wheaton, 40.

Doubtless a direct action in equity would be maintainable to set aside the clause itself if it constituted a cloud upon the rights of the municipality in respect of which no adequate remedy existed at law.

Oakland v. Carpentier, 13 Cal., 540.

But in the last mentioned case, while the court granted the prayer of the bill to set aside the franchise which was held to be illegal, it did not pass upon the question as to whether a lease and deed executed at the same time should likewise be invalidated.

In *Brummitt v. Water Works*, 33 Ut., 285, also cited by our adversaries, the court, while holding that a part of a certain ordinance was invalid, refused to hold that the rest of the ordinance was bad.

Of course there is no difference in this respect between the rule applicable to contracts and to statutes, and this Court has repeatedly held that a statute void in part is not necessarily void *in toto*; and that if the valid provisions in such a statute can be separated from those that are invalid or unconstitutional, only the latter are to be disregarded. *Albany Co. v. Stanley*, 105 U. S. 305; *Baldwin v. Franks*, 120 U. S. 678; *Field v. Clark*, 143 U. S. 649. And it has also been held that, when a statute is valid as to its general or proper application, but void as to some particular application of its provisions, it will be held void only in the particular application sought to be made of it. *Poin-dexter v. Greenhow*, 114 U. S. 270.

CONTRACT AND LEASE OF DECEMBER 11, 1922, NOT AFFECTED
BY "PREFERENTIAL RIGHT" CLAUSE.

And in the case at bar, where the clause attacked was never even a part of the contract and lease of December, to set aside which is the principal object of this bill, any claim that these instruments are rendered invalid because of the presence of such a clause in the preceding contract, especially when the December contract and lease effect the abolition and cancellation of the clause of the preceding contract relied upon as the basis for this attack, cannot, we submit, be maintained.

Let it be again emphasized that whether or not the contract of April 25th was rendered invalid by the clauses which have been discussed, the contract of December 11th was a new contract which, while it related in part to the same general subject matter and contained a recital referring to the preferential right, nevertheless was a new, complete and independent agreement resting for its validity upon the action of the Secretary of the Navy and not upon that of the Secretary of the Interior as the supposed delegate or representative of the Secretary of the Navy; and which was based upon many new and valuable considerations running to the Government, none of which was included in the contract of April 25th.

The theory which apparently was adopted by the District Court, that these documents were all indissolubly connected and that the invalidity of one of them would affect the validity of the others, is wholly untenable.

While it is of course true that if the December 11th contract had been made by the Secretary of the Interior, acting pursuant to the terms of the preferential right clause set forth in Article XI of the April 25th contract, the validity of the December 11th transactions would have depended upon the validity of the provision under which the Secretary of the Interior

purported to act, yet, as we have already pointed out, no such situation exists in the present case since the contracts of December depend for their effectiveness solely upon the subsequent and independent act of the Secretary of the Navy himself.

Any theory of this case which assumes that the lease of December 11 was executed simply pursuant to and for the purpose of carrying into effect the preferential right of the April contract, is foundationless.

If it were a true theory, then the only document which would have come into existence in this case would have been the lease itself. There would have been and could have been no new contract outside of or collateral to the lease under which the Government of the United States would gain any new rights in addition to those which it had acquired under the April agreement. But, as a matter of fact, there was not only the lease of December 11th, but the contract of the same date under which the Government acquired rights of much greater value to it and involving greater cost, expense, obligation, danger and risk to the Transport Company than any which had been contemplated by or provided in the April contract.

As is shown by the analysis of the evidence which we have heretofore made, the December contract and the transactions which culminated in the December contract and lease, were new and independent transactions based upon new motives and reasons, which led the Navy Department to believe them necessary to the national defense. And the lease itself was made as part of the consideration for this new contract based as it was upon new and extremely important considerations and not as a result of the execution of the preferential right in the contract of April. It is to be noted that if it had been made merely in pursuance of the "preferential right" the lease could not have included, as in fact it does include, a large area of land not embraced in the preferential right clause.

Although there is a natural physical and strategical connection between the first Pearl Harbor development, accomplished under the April contract, and the amplification of this development, performed under the December contract, there is no legal or contractual connection between the two.

If the April contract was valid, it must stand irrespective of any objections that may exist to the December contract.

And if the December contract and lease are valid, considered in the light of their own terms, then they must stand unimpeached and unimpeachable, whatever the court may consider as to the technical validity of the April contract. The only effect, legally speaking, which the December contract and lease had upon the April contract was the elimination of the last shadow of importance which Articles V and XI of the April contract might have possessed.

And yet, our adversaries would have the Court believe that this result, absolutely innocent and lawful in itself, had in some mysterious manner the effect of rendering unlawful the very contract of December 11th which accomplished this lawful result!

POINT XI.

There Is No Merit in the Contention That There Must Have Been a Conspiracy Because of the Observance of "Secrecy" in Connection With the Transactions Here Involved.

Plaintiff urged and the District Court found that the making of these contracts was characterized by a suspicious secrecy the purpose of which was to keep the facts from the public and from Congress, and that the secrecy had no relation to military affairs.

On this subject we should first observe that it was nowhere shown or charged that whatever secrecy was observed was suggested or instigated by the defend-

ants or any one connected with them. Nevertheless the so-called secrecy on the part of Government officials is urged as a reason for striking down defendants' contracts and leases.

Such measure of secrecy as there was—and there was in fact little except of a military nature, was adopted and continued, to the extent that it was continued, by the Navy Department. But the plans were known to, the subject of discussion among, and handled by, every official who had any duty to perform in connection with the subject in the two departments of the Government in any way concerned, and as we have already seen the first Pearl Harbor project was made known to the officials of nine corporations, five being oil companies and four engineering companies, and came to the knowledge of numerous others from whom subcontracting proposals was sought.

And on April 18th, the very day of the award of contract, and seven days before its formal execution, there was given to the public press for "immediate release" an authorized statement of the Secretary of the Navy (R. v. II, 519) announcing the character of the project and the award to the Transport Company (ib. 522-3).

Moreover, in little more than a month, on June 3, 1922, the April 25 contract was transmitted publicly to the United States Senate (S. Doc. 210, 67th Cong., 2d session, p. 11).

If a thing can be called suspiciously secret which was known to the President of the United States; the Secretary of the Navy, the Assistant Secretary of the Navy, the Chief of the Bureau of Engineering, the Chief of the Bureau of Yards and Docks, a corps of officials in the latter bureau, the Judge Advocate General, his assistants, the Solicitor of the Navy, and a Navy Council consisting of 14 Admirals; the Secretary of the Interior, two Assistant Secretaries of the Interior, the Director of the Bureau of Mines,

the Chief Petroleum Technologist, the Solicitor's office of the Interior Department, assistants in the Bureau of Mines; the officers, attorneys and directors of the defendant companies; the officers and attorney for the Standard Oil; the officers and attorney for the General Petroleum; the officers and attorney for the Associated Oil Company; the officials of the Union Oil Company; the officers, attorneys, and representatives of the White Engineering Company; the officers and representatives of Ford, Bacon & Davis; the Pittsburgh & Des Moines Steel Company, and The Foundation Company; was made the subject of voluminous correspondence by mail and uncoded telegrams; proposals for which were publicly opened; the substance of which was given to the newspapers before formal contract; and of which Congress was informed before work under the first contract could have been started;—then this was suspiciously secret. The converse of that proposition is of course equally true.

The whole plan of exchanging crude oil from the reserves for fuel oil and storage facilities therefor at strategic points, in accordance with which the contracts of April 25th and December 11th were made, and a copy of the former of these contracts, were fully and publicly disclosed to Congress with a message of the President of the United States on June 7, 1922, in which the President informed the Senate that the policy adopted by the Secretary of the Navy and the Secretary of the Interior was submitted to him prior to the adoption of that policy and the subsequent acts had at all times had the President's entire approval (Sen. Doc. 210, 67th Cong., 2d Ses., pp. III; 2; 10-11; 13).

In a special resolution the Senate provided on June 9, 1922, for the printing of 4,000 additional copies of the President's message and the accompanying communication from the Secretary of the Interior, which made public the aforesaid information (S. R. No. 305; 67th Cong., 2d Ses.).

The Navy Department for two reasons, fully shown by indisputable documentary proof, enjoined the treating of the project involved in these contracts as confidential. One reason was that it involved the military plans of our Government concerning the establishment of a thing important to the naval defenses of the Pacific at a strategic point and at a time when the evidence quite obviously indicates there existed a delicate international situation. The other reason was that the Navy, having been given by legislation power to do that which it thought the national security justified it in doing, feared legislative interference with the power previously given.

We take up the evidence substantiating the foregoing.

First: There will be found in the record letter from the Navy Department signed by Acting Secretary Theodore Roosevelt dated December 9, 1921, addressed to the Secretary of the Interior, transmitting plans covering a storage of 1,500,000 barrels of fuel oil in steel tanks at Pearl Harbor to be constructed and filled with fuel oil in connection with the exchange of royalty oil obtained from the naval petroleum reserves, which letter concludes:

“In view of the fact that this project is embodied in the war plans of the Navy Department it is requested that all matters in connection therewith be regarded in as confidential a manner as possible.” (R. v. I, 331.)

But the District Court says that the war plans had nothing to do with the so-called secrecy!

Admiral Gregory, called to the stand by Government counsel, testified—

“As regards the policy of the Navy Department with respect to the secret or public character of the matters embraced in the contracts in this case, the correspondence which came to the desk of the witness relative to the plans at Pearl Harbor were all marked ‘Secret,’ because they were a portion of the War Plans.” (R. v. II, 567.)

And in the face of that testimony from this high naval officer, put upon the stand by the plaintiff, the District Court says that what is called "secrecy" in this case had nothing to do with the war plans.

Again, testifies Admiral Gregory—

"The witness recalls having impressed upon Mr. Dunn, of the White Company, the secret character of these plans and the necessity of having them handled in the most confidential way; he told Dunn they were part of the War Plans * * *." (R. v. II, 568.)

Again, says Gregory, regarding this subject—

"In the United States Navy, there was in 1921 and 1922, and still is, a General Board," which adopts plans for such development. "These are known as the War Plans * * * and the Department does not care to have them given out." (R. v. II, 545-6.)

The Navy files, as Admiral Gregory's testimony showed and as certain documents introduced during that testimony also showed, in which the papers connected with these contracts were kept, are known as—

"Operations Confidential Files" (R. v. II, 551, 558),

the word Operations meaning the office of the Chief of Operations, the highest officer in the Navy Department at Washington.

The correspondence of the Navy Department, even that carried on within the Department itself, on this subject was marked in large capital letters with the word "SECRET," as will be observed by turning to exhibits on pages 551, 554, 557, 558, Record, Vol. II, introduced in evidence by plaintiff through Admiral Gregory.

Admiral Gregory testified that even as a witness in this case he was not at liberty to testify regarding the Department's fuel storage plans (R. v. II, 560).

Mr. Gano Dunn and Director Bain both testified in detail that the confidential character of this matter was enjoined upon them by the Navy.

Secretary Denby's letter of November 29, 1922, to the Secretary of the Interior, the first act on the subject of an extension of the Pearl Harbor project and the leasing in connection therewith of areas in Naval Reserve No. 1, concludes:

"It is requested that the amounts of storage projected be treated as confidential." (R. v. II, 618).

On January 18, 1923, Acting Secretary of the Navy Roosevelt wrote the Secretary of the Interior on the subject of having the fuel oil exchange made so as to immediately fill the Pearl Harbor tanks and marked the letter at the top "Confidential" (R. v. II, 805).

The Navy Department's plat of the Pearl Harbor station sent to the White Company actually doing this work was so deleted as to be hardly useful, pursuant to their ideas of military secrecy. This the Court will readily see by comparing an undeleted copy of the plat (Pl. Ex. 131, R. v. III, 1206) and the deleted copy of the same plat (Def. Ex. F-4, 1212).

The White Company was not permitted to take progress photographs of this work at Pearl Harbor, as is usual on construction jobs, that being forbidden by the bureau at Washington and by the officers in charge of the station at Pearl Harbor on the ground of military secrecy (R. v. II, p. 927).

Photographs of this work received by the White Company from the Navy Department were mutilated, large parts thereof being cut out and holes being cut right through portions of the photographs. This was part of the military secrecy (R. v. II, pp. 927-8).

It was conclusively proved by documentary evidence that the defendant companies made no secret of their lease. This fact is brought out by correspondence commencing with communications from Bureau of Mines men in the field and Mr. Ambrose at Washington.

Mr. Ambrose in a letter to Mr. Campbell dated Jan-

uary 16, 1923, said that the contract with the Transport Company is one—

“which the Navy considers confidential and of military value and is very anxious that it not be published.” (R. v. II, 878).

And again:

“Obviously, the Navy is not anxious for any more to be said about this than is absolutely necessary, and the Secretary has directed the representatives of the Bureau in Washington to maintain the whole matter confidential as this was requested by the Navy. As a result we have referred all inquiries to the Navy Department and are letting them make whatever announcements or give whatever information they desire * * *. I appreciate that this puts you in a somewhat difficult position, but inasmuch as the naval reserves are considered a part of the National Defense, and as long as the Navy requests us to keep this information confidential, I think that is the best way for us to keep in the clear in the matter.” (R. v. II, 878-9.)

This is a Government's exhibit written by a Government official summoned to the Court by the Government but not called to the stand.

But the District court says, following the contention of counsel who produced exactly that evidence, that the Navy Department ideas on military matters had nothing to do with secrecy.

On July 18, 1923, Acting Secretary of the Interior Finney (it will be remembered that Mr. Fall was no longer Secretary of the Interior at this time) wrote the Secretary of the Navy a letter which, together with Acting Secretary Roosevelt's reply, are interesting (R. v. II, 885,888).

Summarized, they show, first, that the defendants were not making any secret of their leases; second, that the leading facts regarding the December 11th contract (No. 4800) were, says plaintiff's witness Finney, “authoritatively published at time of execution

and the California press featured the news at considerable length" (ib. 886); third, that all but the intimate details of both contract and lease is already fully known to the industry; fourth, that maps issued by the larger California oil producing companies show Naval Reserve No. 1 as leased to the Petroleum Company, thus showing that the compilers have reliable information; fifth, that the Interior Department throughout was acting for the Navy Department.

And Secretary Roosevelt in replying said:

"Since the military features of the national defense enter largely into considerations of this nature, it is believed that a degree of secrecy has surrounded the whole undertaking that is probably not necessary."

And further that—

"As a matter of fact, the contracts have been recorded as public documents and are, therefore, available to any citizen of the United States who will expend the trouble and funds necessary to obtain copies in the customary official manner."

This correspondence followed receipt at Washington of letter from Mr. Campbell, Bureau of Mines representative in California by which it is shown that—

"Representatives of the Pan-American have apparently spread the information that they have a lease to the whole naval reserve No. 1 * * * The Pacific Oil apparently has its information directly from the Pan-American and has all of the Government land in the naval reserve marked 'Pan-American' on its maps." (R. v. III, 1183.)

We submit that what we have thus far shown demonstrates—

1. That everything regarding the confidential character of this matter was dictated by the Navy;
2. That it related to details of navy war plans;
3. That, regardless of what the layman might think of the judgment of naval experts, the Navy officers based their attitude on their ideas of what constituted war plans of a secret nature;

4. That the defendants had no connection with the apparent misconception of the extent of the secrecy but that that was confined to governmental circles and resulted from the understanding of the Navy's directions in the matter; and,

5. That the Government itself proved that instead of the defendant's observing undue secrecy, its course was exactly the contrary.

Finally, when Admiral Robison came into court to testify in this case, even though he came in response to a plaintiff's subpoena, he came with written orders from naval authorities restricting his testimony regarding the subject matter of these transactions. Mark that in the fall of 1924, this officer, when his reluctance to testify was observed, produced and handed to the Court a paper which we have not in the record because only the Court saw it, as counsel agreed was proper, but as regards which we have in the record that the document contained—

“orders from naval authority with respect to the subject” of his testimony at this trial and “with regard to what can and what cannot be disclosed” (R. v. II, 968) .

And when a subpoena duces tecum was issued for papers relating to these transactions, the response came in the form of two certificates from Secretary of the Navy Wilbur and Secretary of State Hughes, that the subpoena would not be honored and that to do so would result in disclosing—

“records of the department of the Navy” which are of a “confidential nature, containing matters of importance to the nation, the disclosure of which would in his opinion be injurious to the public interests and would prove prejudicial to the government,” (R. v. III, 1165-6), which view was concurred in by Secretary of State Hughes. (Ib. 1166-7.)

Second. We have said that the second reason actuating Navy officials, and in no way involving defendants, was their desire to avail themselves of pow-

ers given them by legislation without running the risk of being deprived thereof. The proof of this reason is found in two places in the record. The first is letter of November 4, 1921, from Rear Admiral C. S. Williams, Director of War Plans of the Navy Department, to the Chief of Naval Operations (R. v. III, 1058), in which the writer advises avoidance of undue publicity lest it result in decreased appropriation or the crippling of the reserve so "badly needed" by the Navy.

This might be commended by some. It might be severely condemned by others. But did any one charge that Admiral Williams was in a conspiracy with anybody in this case?

Whether his recommendation was good judgment or bad, based upon mistaken policy or wise, a subject for criticism or praise, it clearly shows that the high naval officials were the ones who were dictating the avoidance of publicity, and as none of them is charged with fraudulent conduct in connection with defendants contracts or with being in any conspiracy, how does that help the Government's contentions here?

The second piece of evidence on this subject is the testimony of Admiral Robison that he discussed with Fall, Ambrose and Bain in January, 1922, the fact that some members of Congress would make trouble if the matter were brought to their attention, and that his position was one of—

"insisting that if Congress had passed a law that gave the Navy Department definite power, they would be recreant in their trust, if it was wise for them to exercise that power, if they failed to do so, and that to be both wise and silent was exactly the witness' view." (R. v. III, 1061.)

It is not clear how the holding of that view by one not charged to have been in any collusion or conspiracy can be used to the detriment of these defendant companies.

As to Secretary Fall's position, on April 12, 1922, he urged the seeking of new legislation; a step which

thus early would have informed Congress of the policy (R. v. I, 393).

In conclusion of this subject we refer to another matter which while not directly connected with it was stressed by Government counsel who in their brief below quoted Admiral Robison's testimony that he—

“was perfectly well aware of the long continued policy of the Navy to advertise for bids on any ordinary construction,”

but

“This whole thing was an extraordinary performance taken all together—it was entirely out of the ordinary.” (R. v. III, 1074.)

We quote Admiral Robison's explanation of this on redirect examination:

“When witness said, in answer to one of Mr. Roberts' questions, that this contract was not ordinary but that it was extraordinary and unusual at that time and place, witness meant the circumstances of the particular period and the particular location were unusual and extraordinary.” (R. v. III, 1142.)

POINT XII.

The Loan of \$100,000 by Mr. Doheny to Mr. Fall (1) in No Way Affected the Transactions in Issue; (2) Was a Bona Fide Loan and Not a Bribe; and (3) Was Not Proved by Any Evidence Competent and Admissible Against the Defendant Companies.

(1) THE LOAN OF \$100,000 BY MR. DOHENY TO MR. FALL IN NO WAY AFFECTED THE TRANSACTION IN ISSUE.

We submit that we have shown conclusively by indisputable documentary and unimpeached oral evidence that the Secretary of the Navy actively, earnestly and completely participated in and dominated the negotiations preceding and the decision culminating in the execution of the contracts and leases, and as it is not charged that he was either a party to any fraud or a victim of any misrepresentation

practiced by these defendants or any one of them, or by anyone else, there is no escape from the conclusion that the Secretary of the Navy, after full and mature consideration and review of all relevant facts, and a detailed knowledge of the contents of the documents, officially executed, with full responsibility, the contracts and leases now before this Court. We submit, therefore, that whatever may be said of transactions between Mr. Doheny and Mr. Fall, of which it is not contended that any other Government official even had knowledge, the contracts and leases entered into between the United States, acting by its Secretary of the Navy, and the defendant companies, cannot be affected thereby.

If what we have just above set down is well founded upon the record at bar then, of course, questions relating to the competency and admissibility of evidence on the subject of a loan by Mr. Doheny to Mr. Fall become unimportant as that transaction is entirely immaterial to the issues in this suit.

(2) THE TRANSACTION WAS A BONA FIDE LOAN AND NOT
A BRIBE:

If in any view of the case the Court should be of opinion that consideration of a money transaction between Messrs. Fall and Doheny might have a material bearing on a just determination of the issues, then logically it would be necessary first to determine whether there is any evidence of such a transaction upon which the Court can judicially act. We submit that under the settled rules of evidence there is not. Before addressing ourselves to that point, and without waiving it, we prefer to present our contention that, assuming the admissibility of the evidence in the record, it shows that the transaction was a bona fide loan and not a bribe and was not intended to and did not affect official action.

The evidence upon which the Government particu-

larly relies is that given by Mr. Doheny before a Senate investigating committee. Neither his appearance nor his testimony was compelled. He came forward voluntarily and made a full statement of the situation to the Senate committee which, with the exception of one evasion, explainable but not commendable, and shortly thereafter voluntarily corrected (we refer to his point that the note was not a note until he could produce the signature as well as the body of it) is not successfully attacked.

This statement cannot be considered as is done in some cases as the statement of an adverse witness, who testifies under compulsion and in respect of whose testimony his adversary has a certain amount of latitude in the way of criticism, but it is the statement of a man who appeared and testified without compulsion or necessity.

As such, it is entitled to be believed in its entirety except and unless it be contradicted by other testimony in the record. And there is no such other testimony.

What is this testimony?

Mr. Doheny states that the transaction was a personal loan, to a life long friend, made with his own money. (R. v. I, p. 199.) In connection with this loan there was no discussion between Mr. Fall and Mr. Doheny as to any contract whatever. (ib.) This loan had no relation to any of the subsequent transactions. It was a loan made upon Mr. Fall's promissory note (ib.) and for which Mr. Fall offered to "give the ranch as security." (R. v. I, p. 210.)

This security was refused by Mr. Doheny who said that he would loan the money on the personal note of Mr. Fall. (ib.) The note was drawn in Mr. Fall's own handwriting, not only as to the signature but as to the body (R. v. I, p. 261). It was one of many similar friendly acts by which Mr. Doheny extended aid to an "army" of less fortunate friends (R. v. I, p. 258).

We emphasize in the strongest possible manner the

existence of an intimate personal friendship between Mr. Doheny and Mr. Fall.

This friendship is shown by uncontradicted evidence. It began some thirty years before in the mining camps of New Mexico. It existed at the time when the Mexican situation became acute and when Secretary—then Senator—Fall developed activities in that direction which were of great benefit to all American industries operating in Mexico, and later when, shortly before November 30, 1921, Secretary Fall told Mr. Doheny of his own personal difficulties.

Its nature was further demonstrated by the fact that Mr. Doheny entertained the idea of not only helping Mr. Fall by the advance of this sum of money, but of employing him after he had left the Governmental service—which it was expected he might do at a not distant date. There was, however, no agreement or understanding between them on this subject.

But this friendship, unquestioned as it has been for these many years constituted no basis for an attack upon governmental contracts in the preliminaries of which Secretary Fall's Department was active.

The friendship explains—and furnishes legitimate and natural reason for—the loan.

There are just two circumstances upon which more stress has been laid than upon all others put together as indicating bad faith in this transaction.

The first is, that the signature to this note was torn off by Mr. Doheny sometime after he received the note.

The second is that Mr. Fall received currency instead of a check at the time the loan was made.

How can it be considered a fatal circumstance that the signature was torn off the note under the circumstances testified to by Mr. Doheny (R. v. I, 260-2) and by Mrs. Doheny (R. v. I, 183-5), when as a matter of fact both the body and the signature of the note were carefully preserved and were produced at this trial, and in view of the fact that there was no earthly necessity for any note to have ever been made

by Mr. Fall if the transaction had been intended to be other than what Mr. Doheny said it was—a loan?

Do public officials who are bribed draw up notes in their own personal handwriting and give them to the briber?

And if the tearing off of the signature for the reasons that Mr. Doheny gave be claimed to be suspicious, the instant query arises—Why should the note have been preserved at all? Why was it not destroyed?

Had this been done the evidence of the alleged crime would have vanished beyond recovery. On the contrary the utmost care was used by Mr. Doheny that this evidence of the personal obligation on the part of Mr. Fall to himself should not vanish (*R. v. I*, 184), although with equal care he did everything in his power to protect his friend from what he believed might be serious hardship if he and his wife should suddenly die (p. 183).

There is no suggestion that Mr. Fall was told of the tearing off of the signature.

Mutilating a note does not have the effect of cancelling unless the same is done “with the intent to extinguish the obligation thereof.” The only effect is, in the event the question is subsequently raised, to put the burden of proving the circumstances of the mutilation upon him who seeks to enforce the note. Sec. 123, Negotiable Instrument Law; *United States v. Linn*, 1 How. 104, 111; 11 L. Ed. 64, 66; *Smith v. United States*, 69 U. S. (2d Wall.) 219; 17 L. Ed. 788, 791; *Roger v. Shaw*, 59 Cal. 260; *Brock v. Pearson*, 87 Cal. 581; *McCormick v. Shea*, 99 N. Y. Supp. 467; *Wallace v. Tice* (Ore.), 51 Pac. 733.

The belief on the part of Mr. Doheny that it was not wise to produce the body of the note without having found the signature was, of course, a deplorable error. But the fact is that he voluntarily corrected that error before there was any effect from it (*R. v. I*, 259 *et seq.*) And the fact remains that he and his wife did produce the note and the signature at the first

opportunity after the signature, which had been mislaid, had been found. He could have prevented his wife testifying, but—again voluntarily—he waived his right (R. v. I, 181).

The loan was made in cash and not in the form of a check, but at the same time there was taken for it—and still exists—a note which constitutes as much evidence of the transaction as a check which would have come back to the same possession and not been of record.

The transactions in suit post dated the loan by nearly half a year as to the first and more than a year as to the second—the latter including the principal lease.

Mr. Doheny's letter of November 28, 1921, had been written to Mr. Fall but an examination of it demonstrates that it was merely an answer to an inquiry based upon an hypothesis which never materialized. Hereinbefore we have analyzed this letter, traced it from inception to the end of it as a step in any negotiations, and shown that it never entered the realm of negotiation for the contracts here attacked or was treated as either a bid or a proposition.

There was but one matter under negotiation on November 28, 1921, and that was the question of whether relief should be granted defendants from the harmful effects of the excessive royalties which they agreed to pay upon a small lease.

The cutting down of the royalties which Mr. Cotter, for the Petroleum Company asked (R. v. I, pp. 156-158) was denied by the man who had received the loan.

New leases—as to which there is not a scintilla of evidence that they were of any value whatsoever over and above the royalties paid—were granted not only to the Petroleum Company but to the Midway Company—a wholly unconnected concern—which also was a sufferer from the high royalties agreed to be paid under the first lease (R. v. I, 159-162). These leases are not under attack in this case. Obviously, this small lease, executed, about two weeks after the No-

vember 28th letter, is the lease to which that letter refers. The chief force of our adversaries' contention in this connection is placed upon that reference. It is unnecessary to argue that if new leases based upon any corrupt understanding had been in contemplation between the sender and the receiver of that letter, no writing which would disclose the idea would have been openly sent by one to the other of the conspirators. And the other conspirator, had any evidence of such leases been furnished by his associate, would never have dreamed of passing it on to the Navy Department, of having it follow the proven routine and of having permitted it to be officially filed.

The theory of wrongdoing in connection with this loan demands proof that Doheny was getting something of advantage for himself or his companies at or about the time when the money was paid.

A man whose thoughts are intent on treachery to his own government for the sake of personal profit to himself does not hand over a large sum of money to an individual in the government service who has no power to act, who does not purport to act, whose tenure of office, the continuance of whose very life, is unfixed and uncertain, and wait more than a year for action.

And what resulted, according to the Government's theory, from this transaction? They have not claimed in their Bill, briefs, or arguments that the "relief leases" above mentioned, which were signed on December 14, after Secretary Fall had refused to reduce the royalties of the original lease, were obtained by the use of this money. No such supposition or claim has ever been made in this case. What then did Mr. Doheny get?

Five months afterwards, on April 25, 1922, after the perfectly *bona fide* efforts which Dr. Bain and Admiral Robison had made to obtain real competitive bids, the company of which Mr. Doheny was then president got the first Pearl Harbor contract. And the Court

below characterized this as of no value except for the alleged preferential right.

As an outgrowth of this contract, the Company got the lease of June 5th because Cotter insisted upon it. Neither Fall nor Doheny participated in its negotiation. The idea of it originated solely with Cotter without any instructions from, or even the knowledge of Doheny or of Fall. And the Court below characterized this lease as of no value.

One year and eleven days thereafter, the Petroleum Company got the first thing which is claimed by the government to possess any value, and that is the lease of December 11, 1922, given as a part of the consideration for the accompanying contract of the same date, both of which were the outgrowth of plans of the Navy and not of those of Fall.

The record is clear to a demonstration—no claim or contention to the contrary is made—that the entire project embraced in the December 11th contract and lease originated exclusively in the Navy Department (R. v. II, 581; 1012; 1022-23; 1024); negotiations which culminated in the execution of these documents were commenced under the express direction of Edwin Denby, Secretary of the Navy (R. v. II, 616-8; letter November 29, 1922); Denby and his representative, Robison, prepared this plan (R. v. II, 1023-4); Mr. Fall took no personal part in these negotiations; those who participated acted solely for the Navy and under its direction (R. v. II, 791, 799-800; 801); every decision in the matter was made by the Secretary of the Navy personally and through his personally appointed representative, Admiral Robison; Secretary Fall neither recommended, requested, nor influenced the making of these contracts or the negotiations leading up to them; he took part only, with Dr. Bain, in the preparation of a suggested royalty schedule, but, in effect, "washed his hands" of that matter and turned it over entirely to Admiral Robison for direct

negotiation (R. v. III, 1031); it was the Navy Department, of its own volition, that proposed and decided to lease the entire reserve, subject to the restrictions afterwards embodied in the lease (R. v. II, 1023); neither Secretary Fall nor any one in the Interior Department made any recommendation on this subject or even recommended the lease of an acre of land in that reserve at this time; Secretary Fall did not see Secretary Denby on the subject; Denby gave his instructions directly to Robison; Robison carried them out; under the personal directions of Denby (R. v. III, 1032) Robison negotiated the contract and lease and agreed to them and Denby approved that agreement (R. v. III, 1038-9); finally, "by direction of Denby" (R. v. I, 706) the contract and lease were submitted to the Judge Advocate General of the Navy and approved as satisfactory to the Navy's legal adviser; they were gone over "in detail and at length with the Secretary of the Navy" (p. 1038) and signed by him only after he was assured their contents were "identical with what he had gone over with the Admiral in detail" (R. v. III, 1040-1).

The picture therefore is that of a man handing over as a bribe on November 30, 1921, \$100,000, and getting nothing of value in return, nor any assurance thereof for more than a year thereafter.

And this theory is advanced although Mr. Doheny expected that Mr. Fall might leave the Government service—an event which, if it had taken place, would have ended at once and for all whatever power or influence it might have been expected at the time that he could have exerted in favor of Doheny's interests (R. v. I, 250).

But our adversaries hasten to reply when Doheny did get something he got something that was worth \$100,000,000.00, and he could well afford to wait and take the chances of a gamble of as small a sum as \$100,000 upon such a possibility.

And in so saying, they completely ignore the uncontradicted testimony given by Mr. Doheny, (who, by the way, had he not been entirely honest and frank, would never have dreamed of giving to the Government the ammunition for attack which was embodied in his \$100,000,000 statement) as to what he meant by this statement itself and as to what it involved.

The \$100,000,000.00, if made, would have accrued during 30 or 40 years. It would have been made after an investment of \$100,000,000 to \$150,000,000 in drilling alone. If drilling had been required at a rate of more than a well for every 10 acres, the expenses would have been increased by at least \$30,000 per extra well. Already (in January, 1924) \$32,000,000 had been spent in preparation for the development of the lease. The estimated profit included everything from the handling of the oil in every way—the piping, storing, refining it and selling it to the consumers. It was an off-hand estimate. (R. v. I, 240, 241-2.)

And this would have been the amount received after the investment of the enormous sums to which we have alluded in a territory only a part of which was proven.

On top of this the Transport Company was required to put up approximately \$14,000,000 in the construction and filling of the Pearl Harbor station, and to take reimbursement out of royalty oil produced from naval reserve leases.

Added to this, defendant assumed continuing obligations running over fifteen years, as to keeping oil available for the use of the Navy at Atlantic and Pacific ports. (R. v. I, 41 to 50.)

A profit was doubtless hoped for as a result of this lease. There is not a word of evidence in the record or in the way of possible inference that this profit was unfair or inordinate in any degree.

The situation presented by the Government's claim is the astounding and unprecedented one of characterizations of the gravest nature possible to make, touching the good faith and honor of a member of the Cabi-

net of the President, and the good faith and honor of one of the great business geniuses of this country, without a scintilla of proof that the transactions in respect of which these accusations are made were harmful to the Government or unduly favorable to the individual.

Small wonder that Judge Kennedy in the *Mammoth* case commented upon the

"unusual situations not ordinarily found in cases of this character * * * the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease in controversy was in itself a bad lease for the Government, except perhaps theoretically by counsel." (5 Fed. (2d) 330, at p. 343.)

In the next place within two or three weeks after the money was loaned by Doheny to Fall, which loan is asserted to have been made in connection with benefits expected to arise out of the Pearl Harbor development and accompanying leases, what do we find Doheny's attitude?

One of complete repudiation of any intention to go ahead with the business.

This repudiation took place in his interview with Admiral Robison shortly after the middle of December. At that meeting Mr. Doheny told the Admiral that he had conferred with his associates and that they thought the undertaking was too risky, and that he had decided not to go ahead. (R. v. II, 996; v. III, 1116.)

He had "paid" his money, if our adversaries' theory is correct, and then just because his associates in the company looked unfavorably upon the project out of which alone our adversaries say he had hope of reimbursement, he decides to sacrifice his chances of payment and to drop the whole matter.

Was ever a bribery conspiracy approached or prosecuted in such a mood?

And it was Robison who by arguments based not upon Doheny's need but upon the country's need, succeeded in procuring from Doheny the promise of a bid. (R. v. II, 995-6, v. III, 1117.)

This incident was shortly followed by the chief alleged conspirator—Fall—turning the entire matter over to Dr. Bain and Asst. Secretary Finney, and telling them to go ahead with it as he would be busy with other matters. (R. v. II, 512, 745.)

Bain determined the list of companies to whom the Pearl Harbor project was to be submitted with request that those companies give the Government bids thereon. (R. v. II, 726.)

Bain in obvious good faith called upon the Standard Oil Company (728), the Associated Oil Company (731), the Union Oil Company (741), the General Petroleum Company (730; 740), as well as the Pan American Company (727), and communicated with the J. G. White Engineering Company (722-25), Ford, Bacon & Davis (729-30), the Foundation Company (770-1, 881), and the Pittsburgh & Des Moines Steel Company (770-1); and sought from these concerns active competition for the contemplated contract. (R. v. II, pp. as above.)

Bain and Finney, acting for the Navy, caused to be sent out the invitations for bids. (R. v. II, 751.)

These men accepted, as an order to which they were subject, Admiral Gregory's substitute theory by which the cost plus basis of bids was eliminated. (R. v. II, 750-1.)

Bain used every possible effort to induce his friend McLaughlin, vice-president of the Associated Oil Company—one of the Petroleum Company's chief rivals—to become interested in this project, a fact which is perfectly and absolutely inconsistent with any idea that efforts were being made to favor the Transport Company in this connection. (R. v. II, 751 to 759.)

Despite the criticism and arguments of our adversaries it is—we say it with entire confidence—impos-

sible for this court to say from the record which Dr. Bain made in his attempt to provoke real competition for the first Pearl Harbor contract, that any thought of favoring the Transport Company at the expense of others existed in his mind or in the mind of Secretary Fall from whom he had received his authority to go ahead. The fact that this company or that company may not have been included in the list of those who were supposed to have been qualified and best fitted to do the work, and who were therefore offered opportunities to bid, is wholly immaterial in the face of the other fact that a number of oil companies and great engineering firms, all of full ability and responsibility, were invited to bid and even urged to bid, supplied with full information and had exactly the same chances that the Transport Company had. This included all the great western oil companies which were in a position to handle a matter of such magnitude, and engineering companies which were competitors of the J. G. White Co. (R. v. II, 913).

THE "PREFERENTIAL RIGHT" CLAUSE IN THE APRIL 25TH
CONTRACT.

The District Court considered this of importance. It said that the contract was of no value and of little interest to the Transport Company without the preferential right (R. v. III, 1350) and that the lease of June 5th was not valuable (ib. 1354). It concluded that there was connection between Mr. Doheny's letter of November 28, 1921, to Mr. Fall, the loan of the former to the latter, and the preferential right clause in the April 1922 contract. The record wholly fails to support the District Court's theories.

The origin of the term "preferential right" in respect of Government oil land leases is found in Section 18 of the Leasing Act of February 25, 1920. Mr. Cotter, who was familiar with the land laws, being anxious to develop some way by which his company would have

a chance of being rewarded for the risks assumed in connection with the Pearl Harbor project, in the event its bid to be submitted April 15, 1922, was accepted, conceived the idea of making an alternative proposal under which, in consideration of added benefits to the Government, the company would "be given preferential right to lease from the Government any lands within Naval Petroleum Reserve No. 1, California, which the Government may decide to lease" (R. v. II, 909-10; v. I, 40).

Had contract embodying such a preferential right been entered into the Transport Company might have obtained something of value. The fact is, however, that the so-called preferential right clause actually inserted in the contract of April 25th was not that asked for but an entirely different thing. Mr. Ambrose of the Bureau of Mines recommended that this right be granted in a radically changed form; and when the contract was prepared for signature it only provided that the Transport Company should have the first right to take or not to take a lease on given lands of the reserve (not including the whole) if it would agree to conditions and royalties proposed by the Secretary of the Interior when and if any such lease was offered, and that if it did not so agree, irrespective of how unreasonable or onerous these conditions might be, the entire idea of a preferential right vanished, and the lease was to be submitted to competition and the Transport Company would have only the right, open to it without any such clause, to bid therefor on equal terms with other bidders.

This was a "preferential right" in name only. Secretary Denby saw that, for he commented to Admiral Robison upon the fact that all that needed to be done if the company did not accept terms laid down by the Government was to put the lease up to competitive bidding (R. v. II, 1003-4). Mr. Cotter instantly recognized that the proposed "preferential right clause"

gave his company nothing, and he urged the acceptance of Proposal A, which contained no such preferential right, and opposed the acceptance of Proposal B with the foregoing modification. In effect he refused to allow his company to sign a contract unless some definite assurance of a lease to some land was given him which would enable him to say to his company that he had obtained something of definite value in exchange for the difference represented by Proposals A and B. This attitude is not left in any doubt because it is confirmed by the letter of April 25, 1922, signed by both Acting Secretary Finney and Secretary Denby (R. v. I, 65-6).

As we have stated, the idea of this preferential right—Proposal B alternative bid—was the idea of Mr. Cotter (R. v. II, 856; 909-10; 928-9). There is no evidence that Secretary Fall or any person in the Interior Department suggested it or knew that such a bid was to be submitted. There is no evidence that Mr. Doheny suggested the preferential right idea or knew of it or was even in the United States at the time.

And it must be kept in mind that the preferential right, such as it is, was granted, not by Fall but by Denby (R. v. II, 1005), and that this was decided on without a word from Fall and before Fall had even been notified regarding any of the bids.

When Mr. Ambrose, a subordinate in Secretary Fall's Department, emasculated the preferential right condition contained in the Transport Company's Proposal B, neither Mr. Cotter nor any one else appealed to Mr. Fall or made any effort to obtain from him the benefit which the District Court believed had been agreed between Fall and Doheny to be furnished in the shape of this preferential right.

The change of language by Ambrose was not even reported to Secretary Fall. There was not the slightest evidence that it was reported to Mr. Doheny. As we have already shown, when Mr. Cotter found what

was the attitude of the Government officials having the matter in charge he endeavored to obtain the acceptance of Proposal A, or, failing that, something in the way of a definite assurance of a lease. This when finally granted was the lease of June 5th.

Let it be noted, moreover, that the Transport Company's Proposal A submitted April 15, 1922, was the lowest submitted; that without condition of any kind it was lower than that of the Associated Company for the same fuel oil and the same storage facilities.

Lastly, as to this phase of the case, as we have shown, the powers purporting to be granted by the preferential rights were never exercised by the Secretary of the Interior or purported to be exercised, to the extent of an inch of ground or a drop of oil.

SECRETARY FALL SUGGESTS LEGISLATION.

We turn again to an act of Secretary Fall's utterly inconsistent with the charged conspiracy, Secretary Fall's letter to Secretary Denby on April 12, 1922—a few days before the bids were to come in (R. v. I, 393)—in which he makes the suggestion that Congress be asked for further legislation—a suggestion that would, had it been followed, have ended any chance of the Pearl Harbor contract with an oil company, and therefore of any preferential right to any further leases in the Reserve ever falling into the hands of his supposed favorites, the defendant companies.

And who was it that refused to adopt this suggestion which would have stopped the whole proposal as then on foot? Admiral Robison and Secretary Denby of the Navy. (R. v. II, 1001-2.)

CONTRACT FROM DENBY.

Cotter, sole representative of the Transport Company handling the matter, demanded that Denby, Secretary of the Navy, should sign the contract upon the ground, expressly taken and insisted upon, that

Fall had no power or jurisdiction. (R. v. II, 916; 529.)

Fall agreed to this at once (R. v. II, 525, 526). It cannot be argued that Fall did this knowing that he could—and intending to—"dominate" Denby, for Fall was several thousand miles away from Denby and in no way communicated with, or in the slightest sought to influence, the Secretary of the Navy.

Denby, a man as to whom not one word of suspicion of wrong doing has been breathed in this case; upon whom there is no suggestion that any fraud or wrongful influence had been exerted—or of whom any request had ever been made by Fall or anyone else—was now concededly in control of the situation.

And this by the specific act of the representative of one of the parties to the alleged conspiracy.

Was any stone left unturned by the alleged malefactors to render nugatory the expected results of their alleged malefactions?

THE DECEMBER 11TH DOCUMENTS

These had their origin in the minds not of members of the Interior Department force, not in the brain of Secretary Fall, or Mr. Doheny, but in the strategic plans and deliberations of the chief heads of the Department of the Navy.

Doheny from another point of view was trying to find a way of relieving the oil situation in California, and preventing an undue depression harmful alike to himself and to the Government, as a crude oil producer. (R. v. II, 1015-24.)

Fall's only attention to Doheny's suggestion was to turn it over to Bain with instructions to "take it up with the Admiral," Robison, (R. v. II, 789), and "to do nothing except as the Navy wanted it done," Fall stating "that it was Navy business" (R. v. II, 790).

But the moving force which brought about this lease and contract was the determination of the General

Board of the Navy Department of the United States. (R. v. II, 581; 1023-4.)

And the specific individual to whose suggestions was due the fact that the lease when made covered the entire balance of the naval reserve No. 1 was Admiral Robison. (R. v. II, 1023.)

The one connection that Secretary Fall had with these negotiations was in preparing with Bain a tentative schedule of royalties as "affording ground for discussion" which was submitted to the Navy Department and to Mr. Doheny and was left entirely to the decision of the Navy without the slightest attempt by Fall to direct or even influence that deciding-department's action. (R. v. II, 794-5, 797-8, 798-800; v. III, 1031-39.)

Thus this contract and lease do not depend for their validity upon any act of the Secretary of the Interior or the exercise of any supposed power contained in the alleged "preferential right" of the contract of April 25th.

OFFICIALS CONNECTED WITH THE TRANSACTIONS

Actually connected with directing and carrying on the negotiations for the contracts and leases here involved; the preparation of specifications therefor; the work thereunder; the legal authority therefor; the legal form thereof; and the naval policy represented thereby, were the following Government officials against whom, we repeat, no charges have ever been made: (1) Edwin Denby, Secretary of the Navy; (2) Rear Admiral J. K. Robison, Chief of the Bureau of Engineering, U. S. N.; (3) Rear-Admiral L. E. Gregory, Chief, Bureau of Yards and Docks, U. S. N.; (4) Rear-Admiral Julian L. Latimer, Judge Advocate General, U. S. N.; (5) Commander Walter B. Woodson, Assistant Judge Advocate General; (6) Pickens Neagle, Esq., Solicitor of the Navy Department; (7) George Dyson, Esq., Attorney, Judge Advocate General's Office; (8) Lt. Keating, Assistant, Bureau of

Yards and Docks; (9) Captain Bakenhus, Acting Chief, Bureau of Yards and Docks; (10) Commander Sherman, Bureau of Yards and Docks; (11) Admiral David Potter, Paymaster General, Chief, Bureau Supplies and Accounts, U. S. N.; (12) Theodore Roosevelt, Assistant Secretary of the Navy (and in the absence of the Secretary, Acting Secretary); (13) E. C. Finney, First Assistant Secretary of the Interior (a presidential appointee and in the absence of the Secretary, Acting Secretary); (14) Dr. H. Foster Bain, Director of the Bureau of Mines (a presidential appointee); (15) A. W. Ambrose, Chief Petroleum Technologist, Bureau of Mines; (16) F. B. Tough, Assistant Petroleum Technologist; and (17) J. McG. Williamson, of the office of Solicitor of the Interior Department. Moreover the policy involved and the plan which culminated in defendants' contracts were the subject of correspondence among naval officials and were discussed and considered at meetings of the Navy Council at which were present such high officers of our Navy as Admiral Coontz, Chief of Operations, the senior naval officer, who was an adviser of the Secretary of the Navy (R. v. II, 975); Admirals Washington, McVay, Taylor, Robison, Potter, Stitt, Latimer, Moffett and Smith; Captains Bakenhus and Willard, Commander Rowcliff; and Major General Lejeune, Commandant, United States Marine Corps.

Aside from Mr. Doheny, those representing the defendants in negotiating and executing the contracts were (1) Joseph J. Cotter, vice-president and attorney; (2) J. C. Anderson, president of the Petroleum Company; (3) J. M. Danziger, vice-president of the Transport Company; (4) Gano Dunn, president, J. G. White Engineering Corporation.

We say again, small wonder that Judge Kennedy in the *Mammoth Oil Company* case remarked that—

“The court has been impressed with two unusual situations not ordinarily found in cases of this character: First, although a conspiracy is one of

the bases for the annulment of the lease, one alone of the many government officials having taken an active part in its consummation is charged with corrupt and ulterior motives. We take it, from the evidence and the expressed views of plaintiff's counsel, that although Denby, Roosevelt, Robison, Finney, Bain, Ambrose, and Eddy had more or less of an intimate knowledge of the entire transaction, and some of them, at least, an active and persuasive influence in bringing it about, they must be considered as absolved from any incriminating fault as to fraudulent motives. Counsel for the government in argument, being asked as to the basis of Admiral Robison's assertive attitude, charged it to superenthusiasm and zeal for the welfare of that defense arm of the government which he represented." (5 Fed (2d) 330, p. 343.)

ALLEGED UNDERSTANDING THAT MR. FALL WOULD BE EMPLOYED BY DEFENDANTS.

Finally, we come to consider the claim that there was an understanding reached "during the course of the negotiations for such contracts and leases" between Mr. Doheny and Secretary Fall that the latter would enter the employ of defendants after he ceased to be Secretary of the Interior, which "understanding" the District Court was of opinion was of itself sufficient reason for voiding the contracts and leases here involved (R. v. III, 1320-3).

Aside from the point of immateriality, as these contracts were directed and made by Denby and not by Fall, the complete answer to this is that there was no such understanding and there was no evidence thereof. All the evidence on this subject is that found in the testimony of Mr. Doheny before the Senate Committee in 1924 in which he said that he expected that if Mr. Fall "did not sell or turn over that land" (referring to the New Mexico ranch), "later on" Doheny "might employ him in connection with our affairs in Mexico, with which he is very conversant." (R. p. 245.)

There is not a word of testimony showing that this subject was ever talked over between Fall and Doheny, much less to show that any agreement or understanding had been reached by them. At most the testimony shows that Mr. Doheny in his own mind thought that at some future time, and then only in the event Mr. Fall's New Mexico enterprises had not been successful, he, Doheny, "might" employ Fall in matters in connection with which Fall's experience and ability would enable him to render valuable services. It is clear that the thought in Mr. Doheny's mind was that if Mr. Fall at some future time was so employed that employment would be of such importance that the compensation it carried would, regardless of any failure in Mr. Fall's enterprises elsewhere, enable him to eventually discharge his debt to Doheny.

Mr. Fall retired from the President's Cabinet March 4, 1923. This case was tried October-November, 1924. There was, of course, no evidence of any employment, such as the District Court said he found had been agreed upon, or of any step toward such employment. If it be said that this was probably due to the controversy eventuating in the filing of this suit, let it be noted that that controversy arose during the Senate investigation, conducted in the fall and winter of 1923, whereas, we repeat, Mr. Fall had returned to private life March 4, 1923, and was from that date free to take up any employment which might have been agreed upon.

Careful reading of those selected portions of the testimony on this subject which the District Court included in its opinion will fail to disclose the existence of that agreement or understanding which the District Court found in and of itself sufficient reason "why the contracts and leases should be voided." (R. v. III, 1320-23.)

Let us illustrate: A and B are litigants in a suit on trial before Judge C; A, observing the Judge's conduct and forming a high opinion of his legal attain-

ments, in his own mind determines that at some future date, after the Judge leaves judicial office, he will seek to retain him as an attorney for companies with which A is connected. No conversation on the subject occurs between the Judge and the litigant. No understanding or agreement is discussed, much less reached. It is simply an idea which A expects in the future he might put into execution. The District Judge in the instant case would strike down any judgment which the record in this hypothetical case showed as having been entered by that Judge in A's favor.

We respectfully submit that such a process of reasoning carries its own refutation.

- (3) THE LOAN OF \$100,000 BY MR. DOHENY TO MR. FALL WAS NOT PROVED BY ANY EVIDENCE COMPETENT AND ADMISSIBLE AGAINST THE DEFENDANT COMPANIES:

The evidence received by the trial court of this transaction was all inadmissible.

As to these corporate defendants the conversation between Mr. Doheny and his wife in their private apartment in New York was manifestly hearsay and the objections to its receipt (R. v. I, 181; 176; 175) and the motion to strike (R. v. III, 1195) should have been sustained.

The same is true with regard to the testimony given by Mr. Doheny in January and February, 1924, before a Senate committee in Washington. The contracts in suit were all executed in 1922. Mr. Doheny retired as president of both the defendant companies, and became chairman of their boards of directors, prior to the end of 1923 (R. v. I, 83-4). His testimony before the Senate Committee in 1924 was a narrative of past transactions. The District Court received it as part of the *res gestae* of the transactions involved in this suit (R. v. I, 193-5). The Circuit Court of Appeals held it to be admissible as a statement by an officer of defendant corporations acting for them and within

the scope of his authority, and also as a "declaration against interest" (R. v. III, 1501). We submit that—

(1) It is clear that the voluntary statement made by Mr. Doheny in 1924 was no part of the *res gestae* of the litigated acts (*Jones on Evidence, Horwitz' Blue Book Edition*, Sec. 344, quoting *Wharton*, page 810; *Cook on Corporations*, Vol. IV, Sec. 726; *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S. 99; *Goetz v. Bank of Kansas City*, 119 U. S. 551, which last cited case is treated as authoritative decision on this point in a host of cases and by numerous text-writers; *Northwestern Union Packet Co. v. Clough*, 87 U. S. 528, the doctrine of which and of *Vicksburg, etc., R. R. Co. v. O'Brien, supra*, has been expressly reaffirmed by this Court in 121 U. S. 637; 124 U. S. 415, 424; 158 U. S. 234, 337; 245 U. S. 229, 250; 21 Wall. 157).

(2) The statements made before the Senate Committee were not those of an officer of defendant corporations acting for them and within the scope of his then authority as such officer (*Jones on Evidence*, 3d Ed., Sec. 255, pp. 383, 384; *Cook on Corporations*, Vol. 4, Sec. 726; *First Unitarian Society v. Faulkner*, 91 U. S. 415; *Goehring v. Stryker*, 174 Fed. 897; *Winchester, etc., v. Creary*, 116 U. S. 161; *Xenia Bank v. Stewart*, 114 U. S. 224); there is no implied authority for a director or chairman of a board of directors to make statements binding a corporation, except when acting as a board (*Cook on Corporations*, Vol. 4, Sec. 726; *Farmers Ginnery Co. v. Thrasher*, 144 Ga. 598; *Allington Co. v. Reduction Co.*, 133 Mich. 437; *Kalamazoo Co. v. McAlester*, 36 Mich. 326; *Green's Brice's Ultra Vires*, p. 503; *Soper v. Buffalo R. R. Co.*, 19 Barb. (N. Y.) 310; *Peek v. Detroit Novelty Works*, 29 Mich. 313; *Niagara Falls Bridge Co. v. Bachman*, 66 N. Y. 61). The declarant was no longer president of the companies and did not have the authority ordinarily implied from the holding of that position, and

declarations made after he ceased to hold that office are not admissible against the companies (*Walker Mfg. Co. v. Knox* (C. C. A. 6), 136 Fed. 334; *Kenah v. The Tug Markee*, 3 Fed. 45; *Woolsey v. Haynes* (C. C. A. 8), 165 Fed. 391; *Hudson Milling Co. v. Higgins*, 85 N. J. L. 268). As a stockholder Mr. Doheny was not authorized to make statements admissible against the corporate defendants (*Cook on Corporations*, Vol. 4, Sec. 726). A majority stockholder as such cannot by his statements bind a corporate entity.

(3) A witness testifying under oath is not acting as an officer subject to and carrying out authority derived from his principal, hence statements made by a "witness" while testifying are not admissible in any subsequent proceedings against the corporation of which he is an officer or agent (*Vohs v. Shorthill*, 124 Iowa 476; *Columbia National Bank v. Rice*, 48 Neb. 431, 67 N. W. 165; *Estey v. Birnbaum*, 9 S. D. 176; *Salley v. R. R. Co.*, 62 S. C. 128; *Louisa County Nat. Bank v. Burr* (Iowa), 199 N. W. Rep. 359; *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923; *Byrne v. Hafner Feed Co.*, 143 Mo. App. 85, 122 S. W. 350; *Rush v. Burns*, 152 Mo. 660, 54 S. W. 1103; *St. Charles Savings Bank v. Denker*, 275 Mo. 607, 205 S. W. 208; *Silzer & Co. v. Melton & Sons*, 129 Ga. 143, 113 S. E. 559; *Harrison County v. State Bank*, 127 Ia. 242; *Fletcher Cyclopedia Corporations*, Vol. 3, Sec. 2163).

(4) The evidence was not admissible as a declaration against interest and does not measure up to any test prescribed for this extreme exception to the hearsay rule (*County of Mahaska v. Ingalls*, 16 Ia. 81; *Smith v. Moore*, 142 N. C. 277, 7 L. R. A. (N. S.) 684; *Halvansen v. Moon*, 87 Minn. 18; *Rand v. Dodge*, 17 N. H. 343; *Churchill v. Smith*, 16 Vt. 560; *Humes v. O'Brien*, 74 Ala. 64; *Berkeley Peerage Case*, 4 Campbell's Reports 401; *Sussex Peerage Case*, 2 C. & F. 85; *Estate of Baird*, 193 Cal. 225; *Smith v. Hansen*, 34 Utah 171, 18 L. R. A. (N. S.) 520; *Life Ins. Co. v.*

Hairston, 108 Va. 832, 128 A. S. R. 989; *Tate v. Tate*, 75 Va. 522; *Massey v. Allen*, 13 Ch. Div. 558). Even if it be assumed that the declarations might have subjected declarant to prosecution, punishment, or penalty, they would be inadmissible (*U. S. v. Donnelly*, 228 U. S. 242, 57 L. Ed. 820). Assuming relevancy, a declaration against interest is admissible at the instance of either party to the suit irrespective of any question of privity (*Jones on Evidence*, 3d Ed., Sec. 323). Certainly the Court would not receive at the instance of defendants Mr. Doheny's declarations, and this simple test conclusively shows that they do not come within the rule respecting declarations against interest.

(5) Cases cited by plaintiff's counsel and by the Circuit Court of Appeals do not support the admission and upon examination are found to hold simply that declarations made by officers of corporations while transacting business for the corporations are admissible in evidence as admissions of the latter (*Xenia Bank v. Stewart*, 114 U. S. 224).

(6) Except for hearsay there was no evidence of the transmission of the sum of \$100,000, or any sum, by E. L. Doheny to A. B. Fall. Without that hearsay such testimony as that given by the witnesses Youngs (R. v. I, 165-8), Little (ib. 168-9), Hill (ib. 171-2), Mack (ib. 173), Benton (ib. 174-6), Harris (ib. 176-7), Flory (ib. 178-9), McInnes (ib. 179-180), and Brownfield (ib. 181) present nothing but a disconnected set of facts insufficient and ineffective to constitute legal evidence of any transmission of money from Doheny to Fall.

We submit that defendants' objection to this testimony (R. v. I, 165-6); 168; 172; 174-5; 176-7; 178; 179; 180) should have been sustained or their motions to strike (R. v. III, 1195) should have been granted and that all the erroneously admitted testimony should be ignored by this Court.

This court as recently as *U. S. v. Donnelly*, 228 U. S.

242, quoted the following words of Chief Justice Marshall in *Queen v. Hepburn*, 7 Cranch. 290, 295, 3 L. Ed. 348, 349:

“It was justly observed by a great judge that ‘all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and now revered from their very antiquity and the good sense in which they are founded.’”

Again, said the great Chief Justice in *Queen v. Hepburn*, as quoted in *U. S. v. Donnelly*, *supra*:

“‘The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well established rule, the value of which is felt and acknowledged by all.’”

To Summarize:

We earnestly submit—

(a) That there was not before the Courts below, and there is not before this Court, any legal evidence of the alleged loan;

(b) That this Court should exclude from its consideration of the case all of the evidence above discussed;

(c) That clearly the statements made by Mr. Doheny when he appeared as a voluntary witness before a committee of the United States Senate do not constitute evidence in this case;

(d) That clearly, also, Mr. Doheny's personal conversation with his wife, at their home, does not constitute evidence in this case.

We further respectfully submit, all questions of the admissibility of the evidence aside, that—

(a) The Secretary of the Navy as matter of law had authority to make the contracts and leases in suit;

(b) The Secretary of the Navy as matter of fact made the contracts and leases in suit;

(c) The Secretary of the Navy was not party to any conspiracy, fraud or wrongdoing;

(d) The Secretary of the Navy was not the subject of any fraudulent representations, deceit, or undue influence.

From the foregoing it follows that irrespective of the relations existing, or any transaction had, between Mr. Fall, while Secretary of the Interior, and Mr. Doheny, the contracts and leases in suit in this case cannot be affected or invalidated.

And, finally on this subject, it should be and we submit it must be held that Edward L. Doheny did not give Albert B. Fall a bribe of \$100,000, or of any other sum, nor did these men ever so intend, nor are the surrounding circumstances consistent only with such an intent.

The rule is settled that "Where two constructions may be placed upon an act, that construction which will make it legitimate and honest will be preferred."

Boone County National Bank v. Latimer, 67 Fed. 27 (C. C.);

Alexander v. Fidelity Trust Co., 249 Fed. 1 (C. C. A. 3);

U. S. v. Mammoth Oil Co., 5 Fed. (2d) 330, 349;

Utah National Bank v. Nelson (Utah), 111 Pac. 906;

Jones on Evidence, Civil Cases (3d Ed.), Sec. 13, p. 18.

All of plaintiff's own evidence on the subject of the \$100,000 transaction proved that it was a loan and intended bona fide by the parties so to be.

POINT XIII.

Neither the Personal Loan Made by Mr. Doheny to Mr. Fall, Nor Any Other Fact Proven in This Case, Constitutes a Violation of Public Policy of Such a Nature as to Render Void or Voidable the Contracts or Leases Made and Executed by Secretary Denby.

The court will keep in mind:

(a) That there is no evidence in the case by which it is possible to sustain the conspiracy alleged in the Bill of Complaint.

(b) That Fall had no jurisdiction in the matter and that Denby, who did have such jurisdiction, exercised it in the manner shown.

(c) That one of the documents attacked was executed five months after the Doheny-Fall loan—that the second was executed more than six months thereafter, and the remaining two were signed one year and eleven days thereafter.

(d) With the foregoing facts in mind, it is evident that some theory had to be devised by which these legal and chronological gaps might be bridged. And this theory was found in the "public policy" argument, advanced by Government counsel as a last resort after they found that they could not prove the bribery conspiracy which they had alleged in their bill. This public policy theory was adopted by the District Court. We submit that it cannot be sustained.

(e) This public policy theory, stated in the way in which it must be stated in order to maintain the court's conclusions, is substantially as follows:

That although the court found that Secretary Fall did not have power, and Mr. Cotter before the contracts were executed so asserted specifically, to bind the Government by his signature to these contracts and leases—this power being solely granted to and retained by Secretary of the Navy Denby—

Although the court, though specifically re-

quested so to do (R. v. III, 1238-9), could not find that Secretary Fall was paid money with intent to influence him in obtaining these leases and contracts—

Although there is not a jot of proof or suggestion that Secretary Denby or any person either in the Navy or Interior Department were conspirators or wrongdoers, or were themselves deceived, defrauded, imposed upon or compelled by Fall or any other person—

Although there is no proof that Fall directed, recommended, requested or in any way caused these contracts and leases to be made by the Secretary of the Navy—

Although there is no proof that any of these contracts or leases were in any way unreasonable, damaging, harmful or unfair to the United States—

Nevertheless, that solely because of the personal obligation of Fall to Doheny, arising out of the loan, every contract and agreement thereafter entered into between defendant corporations and the United States Government—however great the lapse of time since the creation of the personal obligation— in the making of which Fall played any part, although that part was outside of any duty imposed upon him by any law and determined nothing, must as a matter of law, and even though it be not shown to be harmful or unfair to the interests of the Government—be deemed to be voidable at the latter's instance.

(f) We submit this is not the law.

While this argument in its narrower sense involves questions of pleading—for the amended bill contains no such averments or suggestions—yet we are more broadly considering it here.

The principal case upon which the plaintiff relied below is that of

Crocker v. U. S., 240 U. S. 74.

In this case there was specific proof of an agreement to bribe one Machen to procure the very contract which was attacked in the case. The facts appear fully in *Crawford v. United States*, 212 U. S. 183, 189.

Machen was officially vested with important duties regarding the making of this particular contract.

Each of these elements—although alleged in the Bill of Complaint and strenuously contended for at the trial of this case—is absent from the record now presented to this court.

The case of *Garman v. U. S.*, 34 Ct. Cls. 237, was one where it appeared that a reward was offered to a certain person for the specific purpose of securing an advantage from the Government.

In the present case the undisputed facts in the record do not support such a conclusion.

The case of the *Atlantic Contracting Company v. U. S.*, 57 Ct. Cls. 185, was one where, as stated in the plaintiff's brief below:

"The contract itself was tainted with fraud through the conspiracy between the three persons,"

one of these persons being the Governmental officer having the matter in charge.

The case of *Hume v. U. S.*, 132 U. S. 406, was one where the court reached "the natural and irresistible inference of fraud" through gross inadequacy of consideration—an inference which is impossible in the case at bar.

The case of *Seltzer v. Metropolitan Elec. Co.*, 199 Pa. 100, was one which arose on demurrer and in which the bill alleged a conspiracy among the very officials who had power to award the contract.

In this case the Bill of Complaint affirmatively denies the validity of the Executive Order, which alone could give Fall such power.

The case of *Herman v. Oconto*, 100 Wisc. 391, was the decision of a motion for judgment upon a bill which was held to sufficiently allege fraud on the part of certain of the officers who had jurisdiction to award the contract.

It has no bearing upon the case at bar.

The case of *The Washington Irrigation Company v.*

Krutz, 199 Fed. Rep. 279, involved a dictum in which the court said that:

"If *Krutz* (*i. e.*, the Register of the United States Land Office) had accepted the offer of *Schultze* while he was in office, the bribery of the one and the corruption of the other could not be questioned."

This dictum has no application to the case at bar, where there is no element of bribery, since Secretary Fall had no official jurisdiction over the subject-matter and since it has not been proven that he received any advantage in connection with these contracts.

The case of *U. S. v. Carter*, 217 U. S. 286, involved the same facts as those of the *Atlantic Contracting* case, to wit: the abnormal profit which the contractors had in some way been able to realize, and the evidence tracing one-third of *that profit* into *Carter's* (the Government officer having "large powers and considerable discretion") hands, with no credible reason for such result.

All that the *Carter* case holds is that an agent who secretly profits out of a transaction handled by him for his principal, will be compelled in equity to account to the principal for whatever he has thus received.

No such situation exists here.

The case of *Cobban v. Conklin*, 208 Fed. Rep. 231, was one where *some but not all* of the allegations of fraud were proved, the proven facts being an adequate basis for the relief prayed. The case does not touch upon public policy.

The case of *Cowen v. Adams*, 80 Fed. Rep. 448, simply holds that an unproved allegation of fraud does not preclude recovery if other sufficient allegations of fact are proved. No public policy point is involved.

It has no application to the present discussion.

The case of *Lundean v. Hamilton*, 184 Ia. 907 is similar to the *Cowen* case and does not involve "public policy."

The line of cases, of which

Providence Tool Co. v. Norris, 2 Wall., 45;
Trist v. Child, 21 Wall., 441;
Meguire v. Corwine, 101 U. S., 108, and
Oscanyan v. The Arms Co., 103 U. S., 261,

are illustrations, are all cases in which the court found that an *actual agreement existed* to pay for procuring a contract from the Government, to obtain legislation, to procure the appointment of a given person to a United States office, to bribe or corruptly influence officers of a foreign government, etc., etc., none of which elements exists in the testimony or findings in this record. This Court will readily recall that these were simply cases in which it was held that courts would not affirmatively enforce such contracts because of the tendency to evil such agreements may have. No one of these was a case of suit to cancel contracts on the ground of fraud.

To summarize, we respectfully submit:

1. That this court cannot find, upon the evidence in the record, that the loan made by Mr. Doheny to Mr. Fall was made in connection with any contract, agreement or understanding to procure the execution of any of the writings attacked, or otherwise in connection therewith, but that, on the contrary, it was a purely separate and personal transaction between the two men.

2. That it is conceded by the plaintiff that Fall, to whom the loan was made, did not have the power or discretion to make these contracts and leases.

3. That no case cited by the plaintiff, or which we have been able to find in the books, can be advanced as an authority for the proposition that the existence of a personal obligation on the part of a Government officer renders void or voidable contracts executed by another independent Governmental officer, who alone had power to act, and whose action was the result of the exercise of his own judgment, he not having been

imposed upon, misled, or in any way influenced by the officer under the obligation. *Ross v. Stewart*, 227 U. S. 530, 535.

POINT XIV

No Evidence of Conspiracy or Wrongdoing is Afforded by Correspondence Between Applicants for Leases and Various Government Officials, Nor was It Legally Admissible.

Over defendants' objection the trial court permitted counsel for plaintiff to read in evidence sixty-three letters (Exs. 173-236, R. v. II, 623-667) consisting of correspondence between Government officials and persons desiring to lease portions of the naval reserve lands, and those in political life who were endorsing such applications, written in 1921 and 1922, the latest in date being written in October, 1922, in which the several Government officials, writing replies to applicants for leases, stated at the time of the date of such letters that the Government did not intend to enter into further leases of lands within Naval Reserve No. 1.

The writers were not parties to this suit. The defendants were in no way connected with the correspondence. They had no knowledge of any of these letters. They could in no way be bound thereby.

It is submitted that correspondence in no way connected with the defendants was upon the plainest principles of the law of evidence inadmissible as against them or either of them.

Apart from the inadmissibility of the evidence it is apparent that the same was immaterial and that the statements made by Government officials in the exhibits referred to were absolutely and literally true when made. It will be borne in mind, first, that except for strip leases made upon bids received in response to advertisements, and the lease of June 5, 1922, made pursuant to the agreement therefor contained in the Finney-Denby letter of April 25, 1922, the Gov-

ernment at no time prior to the latter part of November, 1922, had decided upon additional leases in No. 1 Reserve. Beginning in the summer of 1922 the overproduction of oil in California made it unadvisable for the Navy to increase production from its lands if this could be avoided; the unchallenged policy of reducing drilling and production, as far as consistent with the protection of the reserve, had been adopted and was in force; the Government by reason of the non-drilling agreement between it and the Pacific Oil Company, had temporary protection in respect of certain areas in Reserve No. 1; the areas which are specifically referred to in the various exhibits above mentioned were not at the time subject to immediate drainage and the statement to that effect made in the letters of Government officials admitted in evidence was in good faith and undoubtedly thought, in the existing circumstances, to be the fact.

As we have hereinbefore several times shown in December, 1922, the Government for the first time decided to lease, if it could make an advantageous contract in consideration thereof, all of the unleased lands in Naval Reserve No. 1; this decision was made by the Navy Department; it was made in connection with the decision of the General Board of the Navy (R. V. II, 581), approved by the Secretary of the Navy, to enlarge the oil storage facilities at Pearl Harbor (R. pp. 581; 1023-4); this decision was dependent upon the obtainment by the Navy of an agreement satisfactory to it embodying what the Secretary of the Navy, and his personal representative Admiral Robison, determined to be considerations warranting such a lease. The record is clear and convincing that there was no understanding, agreement or plan for the leasing of **any part of Naval Reserve No. 1, after April 25, 1922—except the small part definitely agreed on that date to be thereafter leased, and which was leased June 5, 1922—until decision to make further lease was arrived at late in November, 1922, and consummated by the**

lease of December 11, 1922. So that, we repeat, there is nothing in the exhibits referred to under this point which in any way tends to support plaintiff's theory in this case.

POINT XV.

This Suit Can Not Be Maintained Without Proof of Pecuniary Damage to the United States Resulting From the Contracts or Leases Attacked.

A. The record contains no finding to the effect that these contracts or leases were harmful to the Government, or that the Government was in any way damaged thereby.

The District Court made no finding of fact or conclusion of law whatsoever upon this point.

Even as to the amount of royalties payable under the leases, the Court, while finding that Mr. Doheny and Secretary Fall acted in co-operation in fixing these royalties (R. v. III, 1417, 1420), and while finding in its conclusions of law that Messrs. Doheny and Fall "did conspire and confederate for the making of certain contracts and agreements of great benefit and advantage to the Pan American Petroleum & Transport Company," etc., did not make any finding to the effect that the royalties thus fixed were unfair or unreasonable to the United States, or that the contracts and leases, though beneficial to the Transport Company, were not also beneficial to the United States of America.

And there is no evidence upon which any such finding could be properly based, despite the estimates of profits to accrue from the December lease.

And whatever the Court thought upon this point, it was not willing to make any finding to the effect that whatever profits were expected to be gained were in any way unreasonable or unfair.

As to the Pearl Harbor contracts, no question of damage to the United States can be suggested, in view of the evidence that for each dollar spent the Govern-

ment had received \$1.10 in value. (R. v. II, 570.) As to the leases, *infra*.

It is interesting to note in this connection that even the District Court dwelt more largely upon assumptions than upon facts. Thus Judge McCormick said:

"It cannot be said that the United States has not suffered injury or loss of a pecuniary nature," &c. (R. v. III, 1279.) See also pp. 1340 and 1341.

B. The Court of Appeals, while alluding in passing to the suggestion of the District Court that the mere parting with property, even for full value, on the faith of false representations, constituted damage (which is not the law—*Smith v. Bolls*, 132 U. S., 125; *Sigafus v. Porter*, 179 U. S., 116), does not base its ruling upon any such fanciful claim, but relies entirely upon the *Heckman* case, the *Carter* case, and the *Hammerschmidt* case (R. v. III, 1507).

But the *Hammerschmidt* case was a criminal proceeding, in which an entirely different rule governs from that which applies to a civil cause.

The *Carter* case was not an action to set aside a contract, but simply a proceeding in Equity to compel a fraudulent agent to account for a commission or profit which he had made in violation of his trust.

And the *Heckman* case involved only the question whether the U. S. could sue as guardian of an Indian tribe to set aside a land grant, although it had no pecuniary interest in the matter.

None of these cases is in point; and we shall later show that certain other land patent cases which have been alluded to by our adversaries are equally inapplicable.

C. The position of the Courts below is submitted to be contrary to the rule established in this Court and elsewhere.

Even in cases of fraud the plaintiff is not entitled to relief without proof of damage.

This is, of course, not the rule in cases of criminal indictments, such as *Hammerschmidt v. U. S.*, 265

U. S. 182, upon which the Court below placed much reliance. And the distinction between such cases and actions in equity of the nature of the one at bar is frequently lost sight of. Nevertheless, this distinction is fully established by the authorities.

Eichelberger v. Mills Land Co., 9 Cal. App., 628, was an action to rescind a contract for the purchase of land on the ground that it was secured by fraudulent representations. In regard to the necessity of proof of damages to warrant rescission, the Court says:

“* * * Fraud, in order to warrant the rescission of a contract, must be accompanied by some appreciable loss or damage; for ‘courts of justice do not act as mere tribunals of conscience to enforce duties which are purely moral and involving no pecuniary or tangible injury.’ (*Wain-scott v. Occidental, etc., Assn.*, 98 Cal., 253, 33 Pac., 88) * * *.”

Atlantic Delaine Co. v. James, 94 U. S., 207, was a suit to cancel executed contract for fraud. Bill dismissed because the fundamental averment of fraud not sufficiently sustained by proof.

The Court makes the following general statement:

“* * * Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them * * *.”

Ming v. Woolfolk, 116 U. S. 599, is an action for deceit. In its opinion the court asserts the general principal that damage is a *sine qua non* of recovery.

See *Stratton's Independence v. Dines*, 135 Fed. p. 458.

In *Insurance Co. v. Bailey*, 13 Wallace, 616 at 622, it is said:

“Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury.”

In *Garrow v. Davis*, 15 How 272, plaintiff who held a contract for the purchase of land on which substantial payments had been made, but which had lapsed for default in payments, employed an agent to ascertain the lowest price the owners would take for the land under these circumstances, and then to negotiate with others for the sale of any option he might be able to secure. The agent entered into a fraudulent combination with defendant for the resale of the land to him. Suit to impress a trust on defendant's title for plaintiff's use.

It appeared that although the agent acted fraudulently as to plaintiff, nevertheless since he did not obtain the land at a reduced price thereby, but at its fair market value, plaintiff could show no damage as a result of his fraud. The court says on this point:

“To entitle themselves to relief, the complainants must prove fraud and damage; or to state the principle less abstractly, they must show that their agent disposed of what he was employed to sell, for less than its value, and that he did this fraudulently.”

In *Hyde v. Shine*, 199 U. S., 62, which arose on an indictment for violation of Sec. 5440, R. S. U. S. (now Sec. 37, U. S. C. C.), the court says:

“Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss” (p. 82).

There are two important cases in which the matter arose in actions like the present, *i. e.*, suits of equity to cancel instruments pursuant to an alleged conspiracy.

The first of these is *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, 285, where suit was brought by the Government to cancel a land patent on the ground of fraud. The Court said:

"But we are of opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States."

The second of these cases was *United States v. Conklin*, 177 Fed. Rep. 55 (C. C. A. 9), where a similar suit was brought by the United States to cancel a patent. The Court, after discussing the language of *Hyde v. Shine*, *supra*, distinguished criminal cases from equity suits, like the one then in consideration, held that proof of damage to the Government was necessary, and declared that the criminal rule has no application to civil actions.

"The court recognizes the rule which prevails in courts of equity, that injury or loss of a pecuniary nature should be shown to warrant annulment or setting aside of muniments of title. * * * No such condition exists in the case at bar * * * as it does not appear that the Government was in any manner injured, we are unable to see how it could be harmed by reason of the failure on the

part of the grantors to acknowledge the execution of the deed."

In *Clarke v. White*, 12 Pet., 178, 196, the Court said:

"In equity, as at law, fraud and injury must concur, to furnish ground for judicial action; a mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance."

D. The "Land Patent" cases relied upon by the plaintiff as establishing its theory that no pecuniary harm need be proven in connection with actions like the present, are not in point.

The principal cases are:

U. S. v. Trinidad Coal Co., 137 U. S., 161;

Causey v. U. S., 240 U. S., 286.

The *Trinidad Coal Company* case and the *Causey* case, both arose under the public land laws and were brought for the purpose of cancelling patents, the issuance of which had been obtained by fraudulent violation of specific provisions of the public land laws by the patentees.

They were actions brought not upon the general theory of fraud, remediable in equity, but to redress the violations of the provisions of specific statutes.

"The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions."

U. S. v. Trinidad Coal Co., 137 U. S., 161.

"The Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all the people * * * and when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it."

Causey v. U. S., 240 U. S., 399; citing, *U. S. v. Trinidad Coal Co.*, *supra*; *Heckman v. U. S.*, 224 U. S., 413.

In these cases the United States did not occupy its position of an ordinary litigant, a position which the United States unquestionably occupies in this case, but the Government was acting in the land patent cases as sovereign.

The distinction between these cases and the ordinary rules governing equitable actions to rescind contracts has been carefully drawn elsewhere in this brief.

So far from showing that the leases were disadvantageous or that any damage resulted, their advantage and value to the Government was made manifest. In response to the attempt to show that bids received for small tracts covering practically proven territory in Reserve No. 2, for leases under which the royalties themselves were the only returns which the Government would receive, and involving none of the special and unique elements of consideration which this case presents, under which leases there is no evidence of the actual return to the Government, there is this uncontradicted testimony: "The average royalty received by the Government from all the leases in Naval Reserve No. 2 is 18 per cent," whereas the Government received, prior to interruption of operations by reason of this litigation, an average royalty of 28 per cent under the June 5, 1922, and December 11, 1922, leases involved in this case (R. v. II, 829). The plaintiff's attempted comparison of the Interior Department regulation royalties with the royalties reserved under the lease of December 11, 1922 (R. v. III, 1185), was met by the actual facts, stipulated to be true, showing that under the leases here involved up to September 30, 1924 (during a part of which time full operations were interrupted by this litigation), the Petroleum Company had rendered to the plaintiff, and the latter had received, nearly 200,000 barrels of royalty oil over what would have been yielded by regulation Interior Department royalties on the same production (R. v. III, 1194).

And it may also be noted in this connection that three tracts of land in Naval Reserve No. 1 were, as a matter of fact, offered for leasing by public competition pursuant to the conference held in October, 1921, and that no satisfactory bids were received for two of the three tracts offered, the highest bid being of a royalty schedule, running from $12\frac{1}{2}$ per cent to 20 per cent. These two tracts, lying in Sections 6 and 25, are a part of the December 11 lease (R. v. III, 1146-7).

In other words, however productive portions of this Naval Reserve territory might be, the judgment of the bidders at this particular competition was that these special areas of it offered no glittering possibilities.

And when we look at the contract of December 11, and attempt to realize the full value to the Government of the United States of the obligation of the Transport Company to keep 3,000,000 barrels of fuel oil in storage at various points over the entire length of the Atlantic coast line, without charge to the Government, at the Navy's disposition for a period of fifteen years—this being only one of the continuing obligations assumed by the Transport Company under the contract in question—some idea is gained of the considerations which, other than the mere royalties reserved in the leases, the Government obtained. A low value on this storage and on the rate of interest applicable to carrying charges will show a bonus running up into millions of dollars.

The Government had actually under subpoena and in court during the trial of this cause (Clerk's certificate, R. v. I, 103) several of the leading oil experts of the western coast, among them being Messrs. Paul Shoup, President of the Pacific Oil Company and of the Associated Oil Company; H. M. Storey, Vice-President of the Standard Oil Company of California; A. C. McLaughlin, Vice-President of the Associated Oil Company; D. M. Folsom, Vice-President of the General Petroleum Corporation; L. P. St. Clair, Vice-Pres-

ident of the Union Oil Company, all of these corporations being keen competitors of the Petroleum Company.

No men on earth were better qualified to give testimony as to the value and reasonableness of the two leases attacked in this suit.

Had they been called, their testimony would have been admissible.

And yet not a single question was asked of these men or of any other witness as to the fairness and adequacy of the consideration which the Government received for what it gave, or, what certainly was relevant and clearly would have been admissible, what, in their expert opinion, was the value of the leases when made.

To fortify its conclusions as to the lack of necessity for proof of pecuniary damage, the District Court alluded to the joint resolution of Congress, approved February 8, 1924, under which this suit was brought by special counsel as making it "questionable whether such doctrine (i. e., as to pecuniary loss) applies in this particular suit." (R. v. III, 1281.)

This amounts in substance to a statement that the declaration by Congress of its opinion concerning the nature of the contracts and leases now in suit should be given weight by a court in passing upon one of the issues involved in the determination of that precise point.

Mr. Justice Harlan, in *Koshkonong v. Burton*, 104 U. S. 678, said:

"When counsel in *Ogden v. Blackledge* (2 Cranch at p. 277) announced that, to declare what the law is or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point."

We close this discussion by quoting the comment of Judge Kennedy upon the remarkable situation presented in such a suit as this where no claim of pecuniary harm is made:

“There is the significant lack of material damage to the Government which usually attends allegations of fraud, for in the case at bar no attempt has been made to show that the lease in controversy was in itself a bad lease for the Government except perhaps theoretically by counsel.” *U. S. v. Mammoth Oil Company*, 5 Fed. (2d) 330, 343.

POINT XVI

The Transport Company, in any View of the Case, is Entitled to be Credited with the Value of the Royalty Oil Heretofore Voluntarily Delivered to It by the United States, up to the Amount of the Beneficial Expenditures Made by It Upon the Property of the Government and Under the Terms of the Contracts.

We submit that we have hereinbefore made it manifest that the decrees entered by the courts below should be reversed *in toto* and the case remanded to the District Court with directions to enter a decree dismissing plaintiff's amended bill. Should this Court so determine, then the action of the Circuit Court of Appeals in reversing the District Court's decree allowing defendants credit for their respective expenditures under the terms of the contracts and leases involved in this suit will require no attention here. Should this Court determine that for any reason plaintiff is entitled to cancellation of the contracts and leases, or any of them, then we submit that settled principles of equity and justice imperatively demand a reversal of the decree of the Circuit Court of Appeals and the affirmance of that of the District Court.

We earnestly contend that the Transport Company is entitled to the credit allowed it by the District Court irrespective of whether or not—

(a) The contracts under which these moneys were expended by the Transport Company were or were not authorized by law; or

(b) The contracts, even though authorized, were made in due manner and form.

It may be observed that if the law authorized the contracts, then even though their execution were irregular in form and manner, even the Court of Claims would protect the contractors to the extent of benefits received by the United States from expenditures made and that, *a fortiori*, this would be done in an equitable suit for rescission in which the United States is the plaintiff.

We emphasize that the United States has already paid each of the Companies in full for the benefits received by the United States from the respective expenditures made by the Companies, and is now trying to recover back these voluntary payments.

And each of the Companies has already paid the United States in full for the value of all oil received by it, except as to the balance in the Petroleum Company account (R. v. III, 1434).

In other words, the case is not one where the Companies are asking for affirmative action against the United States, but one in which, in the event their contracts are cancelled by judicial decree, they are simply seeking to maintain the status existing prior to the execution of the instruments, which has been reestablished by the payments made by the United States and the value furnished the United States by each of the Companies.

There is no recorded case of which we have knowledge which holds that where an individual, a municipality or the United States Government has received benefits under an instrument purporting to be a contract, and has paid to the other party the value of these benefits, it can be allowed in a court of equity to recover back these voluntary payments thus made. Nor is there any case known to us in which a defendant in

such a cause as this has been compelled to account twice for values received by it.

The very recent decision of this Court in *United States v. Royer* (45 Sup. Ct. Rep. 519, at p. 521) is strongly against such a judgment.

We come now to the details of the points relied upon in support of the Transport Company's position, and the separate grounds advanced by the Circuit Court of Appeals in rejecting the credit.

A. The principal reasons specified by the Court of Appeals for the reversal of that part of the decree which allowed the Companies credits for the expenditures at Pearl Harbor and upon the leased lands were the following:

1. "The maxim (*i. e.*, that he who seeks equity should do equity) is restricted to cases where the plaintiff is wholly without remedy at law, and is entirely dependent upon a suit in equity for relief (citing *Gilliat v. Lynch*, 2 Leigh., 493; *Scott v. Scott*, 18 Gratt., 150; *Dranga v. Rowe*, 127 Cal., 506). Here the plaintiff had a remedy at law, but resorted to equity to avoid a multiplicity of suits" (R. v. III, 1508).
2. The Circuit Court of Appeals further said that to allow defendants the equity granted by the District Court, would be—
 "to ignore the fundamental distinction between cases brought to determine rights as between the United States and citizens depending upon contracts made under the authority of the laws of the United States and cases in which the contracts have been made without authority of law or in violation thereof" (R. v. III, 1512).
3. The Court applied to this case the doctrine of *United States v. Trinidad Coal Co.*, 137 U. S., 160; *Heckman v. United States*, 224 U. S., 413; *Causey v. United States*, 240 U. S. 399, and other similar cases (hereinafter called the "Land Patent cases") and held that the Government in the present case was not seeking equity—

"but fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (R. v. III, 1512).

In answer, we urge—

B. The general principles governing the application of the equitable maxim are—

(a) That it is settled by this Court, and is an established general doctrine that in equitable suits to rescind contracts a defendant who has expended money or parted with value pursuant to the terms of the contract, has an equity by reason thereof which a Court of Equity will recognize and enforce as a condition of granting relief to the plaintiff.

We cite the case of—

Neblet v. McFarland, 92 U. S., 101,

which was an action of this description, in which this Court said:

"In cases of this character the general principle is that he who seeks equity, must do equity; that the party against whom relief is sought, shall be remitted to the position he occupied before the transaction complained of. A court proceeds on the principle that as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. This is no doubt the general rule."

"Assuming that the transaction ought not to have taken place, the court proceeds as though it had not taken place and returns the parties to that situation. Even in such cases the court applies the maxim 'He who seeks equity must do equity' and will thus secure to the wrongdoer in awarding this relief whatever is justly and equitably his due."

2 *Pomeroy Eq. Jur.*, 3d Ed., Sec. 910, 1627;

Marsh v. Fulton County, 10 Wall., U. S., at page 684.

"The plaintiff will not be granted relief until he has placed the defendant in *statu quo*, and

the plaintiff must have done everything in his power to save the defendant harmless."

Story Eq. Jur., 14th Ed., Sec. 957;
Stoffela v. Nugent, 217 U. S., 499;
Dold Packing Co. v. Doermann, 293 Fed., 315;
Twin Lakes Co. v. Dohner, 242 Fed., 402;
Levy v. Kress, 285 Fed., 838;
Shafer v. Spruks, 225 Fed., at p. 482;
Shearer v. Ins. Co., 262 Fed., 868.

(b) In cases where, as here, the defendant has not only expended moneys pursuant to the terms of the contracts attacked, but where such expenditures have been beneficial to the plaintiff, the necessity for the application of this rule is emphasized because otherwise the plaintiff would be unjustly enriched if he were granted relief without allowing the defendant the value of the considerations advanced by the defendant under the contracts.

(c) In this case there is no question upon the findings and record that full value has been received by the plaintiff from expenditures made by the Transport Company under the express terms of the rescinded contracts, which by such beneficial expenditure has accounted to the United States for the value of the royalty oil, with the same effect as though it had paid in cash (R. v. II, 570; III, 1391-2; 1421; 1425; 1427-8).

And the United States has voluntarily made compensation for this value by delivering the royalty oil.

U. S. v. Royer, 45 Sup. Ct. Rep., pages 519, 521.

If such compensation had not been made, equity would have compelled it. But here it has been made.

(d) If the plaintiff be allowed to recover the gross amount of the value of the royalty oil delivered to the Transport Company, and be not required to deduct therefrom the value received by the United States, it will have been unjustly enriched by the decree herein, and will have made the Transport Company pay double the value of the royalty oil.

(e) Our proposition cannot be answered by the claim

that the District Court has found or that the evidence shows that the contract was tainted with fraud, violation of public policy, conspiracy, or other wrongful act.

For nothing is better settled than that this principle of equity for which we contend applies whether or not fraud or other form of bad faith be present, since it is not the province of a court of equity to act as a criminal court to administer punishment, but rather in such classes of cases to restore the parties to the situation which they would have occupied had the fraudulent contract not been made.

Thus in *Stoffela v. Nugent*, 217 U. S., 499, which was an equitable suit to set aside a deed and mortgage on the ground of fraud, this Court required the plaintiff, as a condition of obtaining the relief which he sought, to pay back to the defendant the amount of money which the defendant had advanced under the contract, with interest, saying:

"It is true that the defendant acted fraudulently and knew also what he was about. But a man, by committing a fraud, does not become an outlaw *caput lupinum* (*Nat. Bk. v. Petrie*, 189 U. S. 423, etc.). He may have no standing to rescind his transaction, but when it is rescinded by one who has the right to do so, the Courts will endeavor to do substantial justice so far as consistent with adherence to law. (See *Pullman Palace Car Co. v. Central Transportation Co.*, 171 U. S. 138, etc.) If Nugent (the plaintiff) is allowed to have the land free of all charge, and the defendant's claim is extinguished, Nugent gets much more than he bargained for, and the defendant is deprived of his equitable interest in Nugent's covenant to pay the mortgage deed (*Jones v. Wilson*, 180 U. S., 440, etc.) and is made to lose a large sum really due to him, not from any necessity of justice, but simply because he has acted badly, and, therefore, any treatment is good enough for him."

The same doctrine was applied in *Dold Packing Co. v. Doermann* (C. C. A., 8th Cir.), 293 Fed. 315, in

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which an equitable suit was brought to cancel a lease upon the ground of fraud, in which the Court held that:

"There is another principle that should have been applied in this case as a condition to the rescission and cancellation of the contract. The complaining party must make restitution of the benefits which he has received under the contract. The Dold Company made expensive and valuable improvements to the Omaha plant. The parties recognized that they were needed. They were made in accordance with the provision of the contract."

"It would be spoliation, not justice or equity. A court of equity does not sit for the punishment of criminals. If a fraudulent grantee has violated the criminal law he may be prosecuted and punished in the criminal courts."

Loos v. Wilkinson, 113 N. Y., 485.

(f) This principle of equity requiring restoration of the defendant where possible to the condition he would have occupied had the contract not been made, is not, we submit, limited as the Court below limited it, to cases where the plaintiff is wholly without remedy at law. This is so irrespective of the fact that the Circuit Court of Appeals in so holding entirely ignored the joint resolution of Congress, approved by the President February 8, 1924 (43 Stat. 5), under which resort to equity in this case was required. See pages 342 and 347 hereof.

1. The authorities cited by the Circuit Court of Appeals (R. v. III, 1508) consist of three cases: *Gil-liat v. Lynch*, 2 Leigh (Va.), 493; *Scott v. Scott*, 18 Gratt. (Va.), 150, and *Dranga v. Rowe*, 127 Cal., 506, which are apparently taken from 21 Corpus Juris, p. 175, §153-n.

Neither of these cases involved the rescission of any contract between the parties, or any advances made by the defendants in reliance upon any contract and it is submitted that they have no application to the case now at bar.

2. In many cases this maxim has been applied in equity where the plaintiff had a remedy at law.

Thus in *Canal Bank v. Hudson*, 111 U. S., 66, 82, this Court held that—

“where a party lawfully in possession (*i. e.*, of real estate) under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements,”

and applied the equitable maxim. But under these facts the owner had a perfect remedy to sue at law in ejectment had he desired; and if he had brought such a suit a court might not have given any relief to the person making the improvements.

Armstrong v. Ashland, 204 U. S., 285;

The Court will note that these two cases afford a perfect instance of alternative remedies—one in equity and one at law, and the maxim was applied in the equitable suit although the plaintiff had a remedy at law.

This is the doctrine of the New Jersey Courts, holding that although ejectment might lie, yet—

“when a suitor appeals to a court of equity, he must abide by its principles and submit himself to its policy and practice before relief will be afforded. ‘He who seeks equity, must do equity.’”

Bourgeois v. R. E. Co., 82 N. J. Eq. at p. 215.

3. In every case where rescission of a contract is sought upon the ground of fraud, plaintiff has an alternative remedy at law; and yet in every such fraud case the maxim of equity is applied if the plaintiff elects to seek equitable relief.

“To such a court (*i. e.*, a court of equity) the Farmers Company has elected to appeal for relief and not to a court of law for its damages, as it might have done.”

Shearer v. Ins. Co., 262 Fed., 868.

“Courts of law and courts of equity as a general rule have concurrent jurisdiction in cases of fraud.”

Whitcomb v. Shultz, 223 Fed., 268 at 274 (C. A., 2nd Cir.);

Merry Realty Co. v. Real Estate Co., 230 N. Y., at page 316;

Gould v. Cayuga County Bank, 86 N. Y., at p. 84; 99 N. Y., at p. 337.

“The same principles (*i. e.*, as to restoration of consideration parted with by defendant) apply where rescission is exercised without the aid of equity.”

Williston on Contracts, Sec. 1529.

The learned author recognizes throughout the discussion the alternative remedy at law.

See also, 2 *Chitty on Contracts*, p. 392.

We submit—

That the fact that the plaintiff had a remedy at law, whether adequate or not, in no wise prevents the application of this principle of equity in case where the plaintiff, instead of suing at law, exercises his election to come into a Court of Equity.

(g) The equity which exists in the Transport Company's favor, does not depend upon whether a contract obligation, express or implied, can be held to have arisen running to the Transport Company by reason of the expenditures made by it.

Nor does this equity depend upon ability to show that any contract obligation, if it ever existed, can now be enforced by the defendant against the United States in any court.

Hereinbefore we have endeavored to show that there was ample power given by the law to the Secretary of the Navy to make all the contracts and leases attacked; but even if this were not so, the equitable maxim should, we submit, clearly prevent the United States from recovering now the value of the royalty oil already delivered by the United States to the Transport Company for which value the Transport Company has already compensated the United States as found by the District Court (*R. v. III*, 1391-2, 1421,

1427-8), in the form of beneficial expenditures on United States property.

As we have already shown, equity abhors unjust enrichment. This doctrine is applied to secure—

“to the defendant something to which he is justly entitled by the principles and doctrines of equity, although not perhaps by those of the common law, something over which he has a distinctly equitable right. In many cases this right or relief thus secured to or obtained by the defendant under the operation of the rule, might be recovered by him if he, as plaintiff, the parties being reversed, had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always possible. The rule may apply and under its operation an equitable right may be secured or an equitable relief awarded to the defendant, which could not be obtained by him in any other manner.”

Pomeroy Eq. Jur., 3rd Ed., Sec. 386. See also page 2480.

Another instance of this rule is referred to in *Canal Bank v. Hudson*, 111 U. S. 66, where, in equity, relief for the value of permanent improvements is given to a defendant occupying land without title, although if the owner of the land had recovered possession of it, a court of equity would not grant active relief to the defendant because there was no contract.

The citation from Pomeroy, above quoted, is approved in *Farmers Loan & Trust Co. v. Denver L. G. R. Co.*, 126 Fed., 51 (C. C. A., 8th Cir.); *Union Cent. Life Ins. Co. v. Drake*, 214 Fed., 548 (C. C. A., 8th Cir.); *Central Imp. Co. v. Steel Co.*, 201 Fed., 824; *De Walsh v. Braman*, 43 N. E. Rep. at 599—(Illinois Sup. Ct.).

In this last cited case the Court said:

“If a distinctly equitable right to which the defendant is entitled, even though not at common law, the Court will make it a condition precedent to the relief of the complainant that he shall grant to the defendant such equitable right. More es-

pecially is this true where the rights of the parties grow out of the same subject-matter or transaction."

"A Court of equity may condition, and ought to condition, its grant of relief upon such requirements as are just and equitable although those requirements may not be enforceable in any other way."

U. S. v. Debell, 227 Fed. 779—(in which this principle was applied against the United States itself);

Levy v. Kress, 285 Fed. 839;

Shearer v. Insurance Co., 262 Fed. 868.

A further illustration of the applicability of this rule is given by Mr. Pomeroy in the note to Section 386 in which he refers to cases where a contract, under statute, is void for usury—in which case a defendant who is sued to obtain an equitable decree of rescission of the usurious obligation, will be awarded the amount loaned by him, with lawful interest, although he is absolutely without remedy in any other way.

The same doctrine was declared in *Hubbard v. Todd*, 171 U. S. 501, where this Court said:

"This was not a proceeding to enforce an alleged usurious agreement, but it was petitioner who sought the affirmative aid of equity, which he could only obtain by doing equity."

C. The maxim applies even though the contracts and leases were void because of lack of power to make them.

(a) The Circuit Court of Appeals states that to apply the maxim would ignore the distinction between authorized contracts and cases—"in which the contracts had been made without authority of law or in violation thereof" (*R. v. III*, 1512-13).

All of the cases cited by the Court in this connection are cases where the other party attempted to enforce contracts affirmatively against the United States in the Court of Claims.

Such were the cases of—

The Floyd Acceptances, 74 U. S., 666, 680;

Whiteside v. U. S., 93 U. S., 247;

Hooe v. U. S., 218 U. S., 322.

Chase v. U. S., 155 U. S. 489;

Sutton v. U. S., 256 U. S., 575.

In some of these instances the suit was based upon the theory that the express contract was valid; in some the theory that an implied contract enforceable affirmatively arose out of the payment of value.

Inasmuch as no action could be affirmatively maintained against the United States under the limited jurisdiction of the Court of Claims unless a contract, express or implied, existed, and inasmuch as we have shown that the equitable maxim here invoked does not depend upon the existence of any such contract, express or implied, and inasmuch as the United States is the party who is taking the affirmative in trying to recover value heretofore paid by it for the benefits it has received under the contracts and leases, it is submitted that the cases cited are in no wise inconsistent with the equitable doctrine which the defendant invokes in this suit.

In cases where such equitable rights arise, it frequently is of the greatest importance to ask who is the actor?

If fraud is involved, the guilty party can not maintain an affirmative action against him who is defrauded.

But if the innocent party sues in equity, the Court will always recognize such equities as the guilty party possesses—

"In other words, in a suit brought by the innocent party, the Court, in determining the equity to which he is entitled, should take into account what belongs to the other party, and award it to him. But this is done not for the wrongdoer's sake (*Pullman Co. v. Central Tran. Co.*, 171 U. S., 138, 150) but because equity refuses to give the innocent party more than he is entitled to. The rule, however, is different where the guilty one is the plaintiff."

Diamond Coal & Coke Co. v. Payne, 271 Fed., 362, 365-6.

In *United States v. Royer*, 45 Sup. Ct. Rep., page 519, cited *supra*, this Court said:

"We need not determine whether respondent might have maintained an action against the Government for unpaid salary; but clearly the money having been paid for services actually rendered in an office held *de facto*, and the Government presumably having benefited to the extent of the payment, in equity and good conscience he should not be required to refund it."

The Government has voluntarily delivered to the Transport Company crude oil equivalent to the full value of all Pearl Harbor work, and of the fuel oil supplied by the Company.

The Transport Company is not seeking affirmative relief.

The question is not whether the Transport Company could maintain an action against the Government for the unpaid cost of the construction work. But payment having been made in full by the Government voluntarily delivering crude oil of value equivalent only to actual cost of the construction work and of the fuel oil delivered therein, and the Government concededly having benefited to the extent of all payments made by it,—and on the other hand, the Company having, by its expenditures, once accounted for the value of all royalty oil received, does not the foregoing authority lend much weight to the proposition that in equity and good conscience, the Court should not take

affirmative action requiring the company to again pay the value of this royalty oil?

(b) If it be true in this case that the Transport Company has no affirmative remedy against the United States in the Court of Claims, this fact, instead of being an argument against the equitable credits which the Company asks of this court of equity, is submitted to be a strong reason for granting such relief, inasmuch as only by this means can justice be done.

“Such a court (*i. e.*, a court of equity) ought to render such decrees as will justly adjudge and settle all the equities of each of the parties to this litigation.”

Shearer v. Farmers' Life Ins. Co., 262 Fed., 868.

(c) The reason why the contract is rescinded is immaterial.

It may be void or voidable for fraud.

It may be because the contract was made by a public official who had no authority.

It may be on account of duress—or any other reason whatsoever.

In every case where an affirmative suit is brought in equity to obtain the equitable relief of rescission and incidental remedies, the maxim which we invoke is applicable, and the plaintiff should not be unjustly enriched by any decree which may be made.

The principle which should govern in every one of these cases is that of the placing of the parties—

“as far as possible in the situation in which they would have stood if there never had been any such transaction.”

Neblet v. McFarland (supra).

Public corporations are subject to the rule.

“If the City obtained the money of another by mistake, or without authority of law, it is her duty to refund it.”

Chapman v. Douglas County, 107 U. S., 348;

Pimintal v. San Francisco, 21 Cal., 363;

Argenti v. San Francisco, 17 Cal., 282;

Hitchcock v. Galveston, 96 U. S., 341.

"The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

Marsh v. Supervisors, 10 Wall, 676;

Central Transportation Co. v. Pullman Palace Car Co., 139 U. S., 60-61.

Logan County Bank v. Townsend, 139 U. S. 67, 75-6.

It applies against the United States.

U. S. v. Debell, 227 Fed., 779 (and cases *infra*).

"This general rule (i. e., as to doing equity) applies irrespective of the grounds for rescission. It applies equally whether the ground for rescission was default in performance by purchaser, mistake, illegality of the contract, fraud, or that a deed to the property was delivered without the grantor's authority."

39 *Cyc.*, 1378, and cases cited;

Thomas v. West Jersey R. R. Co., 101 U. S. 71;

Pennsylvania R. R. Co. v. St. Louis R. R. Co., 118 U. S., 317.

The distinction which the Court below asserted between authorized and unauthorized contracts, does not apply where the United States is the actor in equity—where it has already compensated the defendant for the advances made, thus restoring the *status quo*—and where the defendants ask that this status be maintained and that they be not compelled to account twice for values they have received.

D. As to the claim that the United States "is not seeking equity" but is "fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (C. C. A. Opinion, R. v. III, 1512)—

The proposition has been expressed in somewhat different form by counsel for the Government in their brief in opposition to granting relief, in which they said that—

"In a suit brought by the United States of America to enforce a public statute and to maintain the public policy underlying it, the granting of relief will not be conditioned upon the reimbursement of the fraudulent defendant."

Answering this point, we note:

1. The question of fraud may be immediately dismissed from consideration, for, as we have shown, it is settled law that rescission in equity, even though based upon fraud, does not relieve the successful plaintiff of his duty to restore to the defendant amounts beneficially expended under the contract rescinded.

2. The point to be considered is, therefore, whether this action is brought to enforce a "public statute and its underlying policy," and whether any such supposed policy is so important as to deprive the defendants of the right to these credits.

3. When we inquire what the "public statute" and "public policy" is upon which the Government places such great stress, we find that they rely upon the claim that these construction contracts amounted to the establishment of a new fuel depot without specific legislation authorizing one at that place. We have fully discussed this point (*supra*, p. 145).

Disregarding for the moment the fact which our adversaries continually disregard, to wit, that whatever lack of statutory authority existed after March 4, 1913, was amply supplied when the Act of June 4, 1920, had been passed, their argument amounts only to this—

That Congress believed it wise to reserve to itself the power to designate the place where any new fuel depots were to be located and that because of such "public policy" as was involved in this conclusion, they repealed a former statute which left the matter in the hands of the Secretary of the Navy, and left the entire matter blank until further appropriation bills or express legislation of some other sort should be adopted; and that Congress must have been deemed to have

taken this matter so seriously that any private citizen who should thereafter contract with the Secretary of the Navy to build a fuel depot, and should actually build it with his own money, and has been repaid the amount expended, must be sternly refused the benefit of the equitable maxim which we are invoking because of his temerity in so doing, even though the United States becomes the actor in an affirmative proceeding to set aside the contract upon the simple ground that no such power existed.

4. Such an argument is in violation of the ordinary principles of equity and justice which would be applied even in cases of moral turpitude, is not supported by authority, is based upon suppositions contrary to the facts of the case, and will, we believe, be repudiated by this Court.

Truly it would give a surprising definition and effect to the term "public policy."

Presumably no statutes, whether affirmative or negative, whether important or unimportant, or of whatsoever nature they may be, are enacted by Congress without some reason.

And this is so in cases where no statute at all is enacted or a former statute is repealed, thus leaving some particular subject-matter without legislation.

If these "reasons" are always to be considered as matters of "public policy" within the sense of the language used by the Court below, then it must follow that the so-called "public policy" upon which the Court of Appeals and Government counsel rely, is always present in every instance where a Federal statute is under construction. And hence that whenever a contract is set aside because of lack of power, the defendant must be denied equitable relief however clearly it would otherwise be his due.

Such, we submit, is not and cannot be the law.

A mere reason of expediency or good judgment, while it may relate to the public business, does not attain the dignity of so important a general principle of "public

policy" as to overturn the universally applied principles of justice and equity.

And an ordinary statute relating to the administration of the Government's business is not a "public statute" within the sense of the term as used in the cases relied on by the Government, and hereinafter discussed.

United States v. Trinidad Coal Co., 137 U. S., 160, 170;

Heckman v. U. S., 224 U. S., 413, 447;

Causey v. U. S., 240 U. S., 399, 402;

We think we have already shown—

(a) That as a matter of fact the contracts in question did not provide for the establishment of any new fuel depot; and

(b) That if they could be construed as having done so, nevertheless the statute of June 4, 1920, gave the Secretary of the Navy ample power in that regard.

But, further than that, it is, we submit, true that even if there were a complete absence of power in the Secretary of the Navy to authorize the construction of the Pearl Harbor plant, nevertheless, there is no warrant in any statute or any decision for holding that the Transport Company, which did actually go ahead and construct the plant upon Government property, to the Government's unquestioned benefit, is barred by any consideration of "public policy" from being entitled to retain the value which the Government delivered to it as against such construction, and from thereby avoiding the necessity of paying the Government twice for the value of all royalty oil received by it.

We proceed now to the cases upon which the Government and the Court of Appeals relied in support of the public statute and underlying "public policy" argument.

All of the authorities upon which the Government counsel and the Court below relied in this connection are cases arising under various public land laws of the United States.

These cases—of which the *Trinidad Coal Company*, *Heckman* and *Causey* cases, *supra*, are the chief illustrations—are clearly exceptions to the general rules of equity, which rules, as this Court has declared, must always apply even as against the United States “except as limited by special statutory provisions.”

U. S. v. Detroit Lumber Co., 200 U. S., at p. 339.

In these cases (which we will hereafter call for convenience “land patent cases”) special statutory provisions, based upon important considerations of real public policy, existed.

The points to be noted as to these cases are that—

a. They did not involve contracts voluntarily entered into between the United States and others.

They are cases of land patents issued under the terms of mandatory statutes which gave the entryman as an act of grace from the sovereign, a right to his patent if he complied with the terms of the statute.

b. They were not entered into upon a business or commercial basis.

“In making regulations for disposing of them (*i. e.*, the lands) Congress took no thought of their pecuniary value, but in the discharge of a high public duty and in the interests of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by association of persons at prices below their actual value.”

United States v. Trinidad Coal & Coke Co., 137 U. S. 16.

c. These statutes contain specific provisions as to the conditions upon strict compliance with which only the entryman could become entitled to his patent.

Thus the *Trinidad Coal Co.* case involved violation of the provisions of Section 2350 of the Revised Statutes, providing that—

“The three preceding Sections shall be held to authorize only one entry by the same person or association of persons and * * * no associa-

tion of persons any one of which shall have taken the benefit of such Section either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof."

The patents issued in the *Trinidad Coal Co.* case were attacked upon the ground that this prohibitive clause had been violated, and the patents were set aside upon this ground.

The Court did not require the United States to refund to the defendant—

"moneys which it is alleged were furnished by the defendant to the several persons to whom patents were issued."

and disposed of the case upon the specific ground that—

"the controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions."

It is submitted that there is no similarity whatever between the *Trinidad Coal Co.* case and the one at bar.

In the *Heckman* case (224 U. S., 413), the violation of another positive and prohibitory statute was involved, to wit:

"That no full-blooded Indian * * * shall have power to alienate, sell, dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act," etc.

The United States maintained a bill on behalf of the Indians to set aside certain conveyances as being in violation of this statutory prohibition.

It is submitted that no similarity exists between that situation and the one in the case here at bar.

In the *Causey* case, 240 U. S. 399, a homestead entry was made by Causey—

"by taking an oath as was required that he had not, directly or indirectly, made or would not make

any agreement whereby the title which he might acquire would enure, in whole or in part, to the benefit of another."

This affidavit was false, and under the law, the making of it constituted the crime of perjury.

Sec. 2294, 8 Fed. St. Ann., 572.

It should be noticed, in this connection, that the Homestead Law originally contained a section expressly providing that if a patent was obtained in violation of the statutory conditions, the patentee should not be entitled to the return of the moneys which he had paid as a condition of cancelling the document which he had thus fraudulently and perjurally obtained.

While this section was subsequently repealed, it was the basis of the doctrine which was carried through the subsequent decisions.

In *Washington Securities Co. v. United States*, 234 U. S. 76, the issue of the patent was obtained by fraudulent proof to the effect that the lands were agricultural in character, and, therefore, subject to entry under the Homestead Act, whereas, in fact, they were known to be "valuable coal lands."

In *United States v. Poland*, 251 U. S. 221, the only other decision of this Court cited by the Circuit Court of Appeals, the patent was obtained by fraudulent violation of the prohibitions of the Homestead Act, to the effect that no one settler should enter and acquire more than 160 acres in a single body. This was done through the filing of a false perjurious affidavit.

Again, we have a case of fraudulent violation of the express prohibitions of the land statutes.

d. In the present case no violation of any such mandatory, prohibitive or criminal statute is involved.

So far as the law is concerned, the Court below simply held that the Secretary of the Navy had no authority to make these contracts.

In none of the above cases was the United States ask-

ing in addition to its prayer for cancellation, for the return of money or of things of value which had been delivered by it to the defendant in consideration of benefits received by the United States from the defendant.

e. In all of the Land Patent cases cited by the Court below the United States was acting not in its commercial but in its sovereign capacity.

In the case at bar, so far as the Transport Company is concerned, the transaction in question was a contract whereby labor and materials were to be furnished to the United States in the construction of a storage plant and fuel oil was to be delivered into that plant. We submit that clearly the United States was acting in its commercial—its private—its business—capacity and not as a sovereign.

“If it (*i. e.*, the United States) comes down from its position of sovereignty and enters the domain of commerce it submits itself to the same laws that govern individuals there.”

Cook v. U. S., 91 U. S., 389;

See Hollerbach v. U. S., 233 U. S. 165.

That a construction contract is a commercial contract was held in *U. S. v. Fuller Co.*, 296 Fed., 180 (Dist. Court, Kan.), citing the foregoing authorities.

“We have many times decided that when the United States, through their duly authorized agents and officers, enter into contract arrangements and stipulations with their citizens in matters pertaining to the public service and in the mode provided by law, they *pro hac vice* relinquish their sovereign character and submit themselves to those rules of justice and right which all just governments administer and enforce between man and man.”

Mann v. U. S., 3 Ct. Cl., 404;

U. S. v. No. Am. Comm. Co., 74 Fed. Rep., 151.

There was no statutory compulsion upon the government or upon any official to enter into the arrangements attacked in the present case. There was no express

provision of law under which anybody had a right to demand that if he had performed the statutory conditions he was entitled to have these contracts or leases made. These instruments were executed in the exercise of the discretion vested in the Secretary of the Navy and stand upon the considerations that actuate the government or any official thereof in acquiring supplies or property of any kind for the United States.

All such matters are purely commercial. And no such matter involved any such relationship as to make the private contractor a trustee for the government, or as to govern the transaction by any rules other than those applicable between private individuals.

"No cases have been found which hold that a person who is not the officer or representative of the government occupies, in dealing with it, the position of, or a position akin to, that of a guardian or trustee. When the government enters into a contract with an individual or corporation it divests itself of its sovereign character as to that particular transaction and takes that of an ordinary citizen and submits to the same law as governs individuals under like circumstances."

U. S. Bentley, 293 Fed. Rep., 235; citing

Cook v. U. S., *supra*;

U. S. v. Products Co., 300 Fed., 451;

Lyons v. U. S., 30 Ct. Cl., 352.

"The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf and obligations which would be implied against citizens under the same circumstances will be implied against them."

Bostwick v. U. S., 94 U. S., 53.

f. The Circuit Court of Appeals fell, we submit, into clear error when it said that

"in the present case, although the suit is in form a suit to cancel leases of the public domain, the United States is not seeking equity. It is but fulfilling its duty to protect the public domain and to compel compliance with fundamental laws of the United States" (R. v. III, 1512).

The learned Court forgot, we think, that if the United States were not "seeking equity" in this case it certainly could have no status to maintain a demand against the Transport Company for an accounting for the value of royalty oil delivered to it, or to obtain an injunction or receivership in connection with the subject-matter of the litigation.

Furthermore, it is not merely seeking to cancel leases of the public domain, but two contracts, providing in part for construction work and in part for supplying oil, involving only personal property.

The lands which were covered by the leases had long been expressly withdrawn from the public domain and had been set aside for purposes connected with the practical operation of the United States Government in its executive branch, precisely as is the case in the instance of every post office, navy yard, warship and other physical appurtenance of the conduct of the Government.

Unless every article of physical property owned by the United States and actually utilized in the conduct of its executive business can be considered a part of the "public domain," and to such an extent that every contract made by the United States in relation thereto is attended by such sanctity that the United States is not subject to the rules of equity which govern all private individuals, then contracts relating to these Naval Reserve lands must be considered as within the rule amply covered by the authorities herein cited, to the effect that when the United States acts in its proprietary capacity and not in its sovereign right, it must be bound by the same rules, which, in order to do justice, are applied in the case of private litigants.

And this point can be made even more emphatic in the case of the two contracts since these contracts had to do with facilities provided upon property which had for years been set aside and used by the United States solely as a Navy Yard. Under one of the contracts the Transport Company delivered, and the Government

accepted, and retains, 1,453,274 barrels of fuel oil—at an actual cost shown and agreed upon in this case (R. v. III, 1201; v. II, 809-11; 816; 818). How defendant's right to reimbursement for that cost can be connected with the public domain is not evident.

The term "public domain" in the sense in which it is used by the Government counsel can have no possible meaning which results in said contracts being governed by special, harsh, unjust and punitive rules.

In bringing this suit the United States is not seeking to "compel compliance with fundamental laws of the United States" except in the broad sense applicable to every case which involves not the violation of an express statutory prohibition, but the mere interpretation of a general law. There are no such laws of the United States involved in this action as were involved in the land patent cases.

Hence, we submit that not merely is the United States bound by the general rules of substantive law which would affect an individual, but that it is also bound by all rules regulating the remedy invoked which would apply if an individual were the plaintiff.

"When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject-matter. The absence of legal liability in a case where, but for its sovereignty, it would be liable, does not destroy the justice of the claim against it. When the question concerns what would be paramount claims against a vessel libelled by the United States were the vessel in other hands, the moral right of the claimant is recognized."

U. S. v. Thekla, 266 U. S. at page 340.

In this case a judgment for damages against the United States was entered and approved by this Court, although the claim could not have been asserted affirmatively against the Government.

The Western Maid, 257 U. S. 419, serves to empha-

size the correctness of our position here and the support which *The Thekla*, *supra*, affords to that position. In the former of these cases the Court held that the United States could not be held liable for damages resulting from collisions the fault of vessels owned by it absolutely or *pro hac vice* and employed by it in public purposes, when the libels were brought by the owners of the vessels collided with. The Court held that "The personality of a public vessel is merged in that of the sovereign" and as "the United States has not consented to be sued for torts" it could not be said that in a legal sense it has been guilty of a tort. As the libel in admiralty was in substance a tort action against the owner of the vessel, and that owner the United States, the suits could not be maintained. In the earlier case of *The Siren*, 7 Wall. 152, the Court held that the proceeds of the sale of that vessel, which at the time of collision with the sloop Harper was being operated by the United States, were subject to the claim of the Harper's owners for damages. "The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject matter. 7 Wall. 154." In a word, *The Siren*, as the *Western Maid* recognizes, is authority for holding that while a ship-owner could not enforce his claim by the institution of an original action against the Government, nevertheless when the sovereign comes into court and institutes action to enforce a claim it submits itself to any judgment which justice requires shall be entered in that proceeding in respect of the subject matter. *The Thekla*, 266 U. S. 328, reaffirms the doctrine of *The Siren* and distinguishes that of *The Western Maid*.

In respect of the subject-matter of *The Thekla* case it is to be noted, first, that Congress had not given consent to be sued; and, second, that Congress had not authorized any officer of the Government to contract that the Government would respond in damages re-

sulting from collision committed by a Government vessel. Nevertheless, said this Court:

"It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act." 266 U. S. 328, 341.

Also—

"The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases the question of damages to the colliding vessel necessarily arose and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States." (266 U. S. 339-341)

Here the United States not only came into court to assert a claim but it did so pursuant to an express law so directing as to these very contracts and leases (43 Stat. 5). Moreover, by that statute a suit in equity was imperatively directed: "The President * * * is authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases [of June 5 and December 11, 1922] and contract [of April 25, 1922] and all contracts incidental or supplemental thereto [of December 11, 1922], to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief," etc. Only in equity could a suit for cancellation, injunction, and further appropriate incidental relief be instituted and prosecuted. Whatever may be said regarding the invalidity of a legislative direction to the President in respect of the executive function of taking care that the laws be executed (Constitution, Art. III, Sec. 3), it is undoubted

that by law the Congress may direct what courts and character of proceedings shall be resorted to by the United States in respect of matters pertaining to the disposition and regulation of property belonging to the United States (Art. IV, Sec. 3, Clause 2).

Counsel in this suit did not select Equity to avoid a multiplicity of suits. They acted under legislative mandate, regarding the specific subject-matter of this suit, which directed a suit to accomplish that which came within the exclusive jurisdiction of a court of equity. Having gone into that Court to assert its claim the action carried with it the acceptance of the full power of that Court to decide all questions in accordance with the principles of equitable jurisprudence. By that act the United States so far took the position of a private suitor as to agree that justice should be done with regard to the entire subject-matter of the suit.

A similar principle is asserted in *U. S. v. Stinson*, 197 U. S. at page 205.

“With a few exceptions growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter”—

McKnight v. U. S., 98 U. S. 179, in which the Court refused to allow money, paid by the United States under an assignment of claim which was void, to be recovered.

“Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors seeking, in the administration of the court of equity, relief.”

Brent v. Bank of Washington, 10 Pet. at 614:
U. S. v. Arredondo, 6 Pet., 712.

This principle has been applied in many cases in the lower courts, and in some of these cases rights have been enforced against the United States which could not have been enforced against it had the other party been the actor.

U. S. v. Debell, 227 Fed. 779;
U. S. v. Oklahoma Gas Co., 297 Fed. 575;
Judson v. U. S., 120 Fed. 643;
U. S. v. White, 17 Fed., 565;
U. S. v. Budd, 43 Fed., 464;
Church v. Church, 71 Fed., 252;
U. S. v. Commercial Co., 74 Fed., 145;
U. S. v. Diamond Coal Co., 254 Fed., 286;
U. S. v. Commissioners, 254 Fed., 543.
Mountain Copper Company v. United States
 (C. C. A. 9), 142 Fed. 625, 629;
United States v. Dominion Oil Company, 241
 Fed. 425 (D. C. S. D., Cal.).

"The underlying principle of all the decisions is that when the sovereign comes into court to assert a pecuniary demand against a citizen the court has authority and is under duty to withhold relief to the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum in like subject-matter between man and man."

Walker v. U. S., 139 Fed. at 413.

g. The Circuit Court of Appeals felt that if it upheld the allowances of credits to the Companies, as provided in the District Court's decree, it would "require the Court to exercise functions which belonged to the legislative branch of the Government * * * and to make judicial disposition of the public resources of the United States" (R. v. III, 1512).

But if this were a sufficient reason against applying the maxims of equity to protect a defendant in cases where the United States has voluntarily gone into equity, then this maxim could never be applied in favor of a defendant in an equity suit brought by the Government.

As we have already shown, no such limitation exists.

If the United States seeks to rescind a contract, it must restore or maintain the *status quo*, even though the defendant could not bring an affirmative action in equity or at law to reimburse himself.

In the *Thekla* case (*supra*), this Court enforced a moral right against the United States and "judicially disposed" of many thousands of dollars, although the party in whose favor this disposition was made, could not have maintained an affirmative action against the Government.

And so it is in every case where an equity exists—even in favor of a wrongdoer—provided that the United States has elected to seek relief from a court whose function it is not to punish but to do justice as to all points involved in the controversy.

h. Again, even in the *Heckman* case, involving as it did a mandatory statute, this Court held that the Court might provide for a return of the consideration, if this could be done "consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restrictive lands in accordance with the statute."

Heckman v. U. S., 224 U. S., 447.

This part of the opinion was entirely overlooked by the Court of Appeals.

In the present case a provision directing that the consideration advanced by this defendant under the terms of the contracts, and thereafter repaid it by the United States, be allowed to be retained by this defendant, can in no possible manner adversely affect the right, if any, of the United States to set aside the contracts attacked.

i. So far as the Transport Company's claim to this credit is concerned, it involves no questions as to the public domain.

The questions have to do solely with the value of personal property.

On the one side, the Transport Company is debited with the value of royalty oil coming not merely from the lands covered by the leases made to the Petroleum Company but from all leases made upon any part of the two Naval Reserves.

(We wish to make it clear that long prior to the making of these contracts, many leases had been made by the Government upon various parts of Naval Reserve No. 2, which lies adjacent to Naval Reserve No. 1, and that a very large part of the royalty oil received by the Transport Company under both of its contracts, was acquired by the Government, not under any leases made to the Petroleum Company, but as a result of these separate and independent leases on different property made with a large number of lessees.)

On the other side, the Transport Company claims to be credited with the expenses incurred under a contract for fuel oil and storage facilities therefor at the Naval Station at Pearl Harbor.

The transaction is submitted to be clearly a commercial question and directly within the doctrine of the authorities distinguishing between the position of the United States acting commercially and the United States acting in its sovereign capacity.

U. S. v. Bentley, 293 Fed. Rep., 235;

U. S. v. Commercial Co., 74 Fed. Rep., 151;

U. S. v. Products Co., 300 Fed. Rep., 451.

j. Since the only effect of the construction which the lower Court has given to the statutes here involved is to make the contract *ultra vires*, and since no question of violation of any real public policy is involved, the principle of the *Causey* and other cases cannot, it is submitted, apply.

Chapman v. Douglas Co., *supra*.

k. This cause is covered by the observations of this Court in *United States v. Detroit Timber Co.*, 200 U. S., pp. 321, 339.

“In passing upon transactions between the Government and its vendees, we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions.”

In the case now at bar there is no such special statutory limitation upon the operation of the equitable rule.

l. The governmental agencies having charge of this suit had no power to elect the forum or the remedy. That had been done by a law expressly passed for this suit (43 Stat. 5, Joint Resolution, approved by the President February 8, 1924).

m. The United States, pursuant to this special law, invoked the jurisdiction of equity not merely to avoid multiplicity of suits but to obtain advantage of equitable remedies (affirmative decree of rescission, accounting, injunction, receivership, etc.), which it could not enjoy at law.

It seeks equitable relief and not merely protection against a duplication of proceedings at law.

There are only two defendants.

The mere desire to join these two defendants in one suit would, it is submitted, not give a court jurisdiction by itself if it did not otherwise exist (239 Fed. at p. 411).

And in the plaintiff's bill it avers inadequacy of legal remedies as its first ground for asking equitable intervention (R. v. I, 22).

n. It is earnestly submitted that the refusal to apply the principle that he who seeks equity must do equity in favor of the Transport Company as against the United States, under the facts and the authorities above referred to, is not consistent with the law as laid down by this Court and other Federal authorities, is contrary to the practice in cases of this nature, is not supported by the authorities relied upon, and would convert a court of equity into a tribunal for the administration of penalties instead of a tribunal where purely equitable doctrines are applied.

"The relief which a court may grant should not be harsh or oppressive on the defendant, or in any other manner work injustice."

Levy v. Kress, 285 Fed., 838.

"A Court of equity * * * ought as nearly as possible to do equity. Its province is not the infliction of punishment."

Shearer v. Insurance Co., 262 Fed., 868.

In good faith the Secretary of the Navy decided that contracts providing for the exchange of crude oil from the naval reserves for fuel oil and other petroleum products, and storage facilities in which to keep and from which to handle the same for naval purposes, could and should be made (R. v. 702; 982-3). The legal adviser provided by the law for the Secretary of the Navy formally advised him of the legality of this (R. v. II, 702). Officers and directors of the defendant were informed of that legal opinion and of the decision of the Secretary of the Navy in the premises (R. v. 727). The President and the Congress of the United States, as well as the head of its Navy Department, with full knowledge that this great and expensive work was in progress, permitted it to proceed to the end that the Government might have the manifest advantage thereof (Sen. Doc. 210, 67th Congress, 2d Sess., June 7, 1922, pp. 2; 10-11; 13; also R. v. III, 1159-61). The work has been completed, 1,500,000 barrels of fuel oil are in storage at Pearl Harbor. The Government has delivered to the company all the crude oil called for by the contracts. In such circumstances no equitable principle and no theory of public policy can possibly warrant a court of justice in holding that the Government may retain the benefits accepted by it under these contracts, and at the same time require the defendant to yield back that which has been delivered to it in consideration thereof.

POINT XVII.**The Circuit Court of Appeals Also Erred in Refusing to the Petroleum Company the Credit Allowed by the District Court.**

1. In support of this proposition the Petroleum Company relies upon each and every argument included in Point XVI relating to the position of the Transport Company.

2. It also desires to refer particularly to the cases of *Pine River Logging Co. v. United States*, 186 U. S., 279, *Woodenware Co. v. United States*, 106 U. S., 432, and *Union Naval Stores v. United States*, 240 U. S., 284.

These cases, which are illustrations of a number of other cases cited by Government counsel, were particularly alluded to by the Circuit Court of Appeals in its opinion (R. v. III, 1513) as a basis for holding that the Petroleum Company was in the position of trespasser upon Government lands and, therefore, had no right to retain the cost of improvements made upon those lands.

None of these cases is applicable for the reason that in none of them did the party sued by the Government take possession and make expenditures pursuant to the terms of any contract which the Government had executed or purported to execute, which contract required the defendant to do the things which he did.

The rule which the Court invoked has reference solely to the cases of trespassers—not under contract.

The rule which the Petroleum Company invokes in this case is the rule applicable to all situations where contracts came into existence, where they are sought to be rescinded, where expenditures have been made by the defendant pursuant to the compulsory terms of these contracts, and where these expenditures are beneficial to the party seeking the aid of equity. In such cases, the maxim which we invoke applies.

In the case at bar, the United States is not suing in its capacity as *parens patriae*, i. e., to assert a right affecting public welfare, but in its private capacity as a property owner. *Denver, etc., R. R. Co. v. U. S.*, 241 Fed. 614, 618-19, in which the Circuit Court of Appeals, 8th Circuit, held that when the Government comes into court as a land owner asserting a property right it "has no special privileges as a litigant. Its rights are no greater, no higher, no better, and no less than those of an individual."

That the expenditures made by the Petroleum Company were made on the leased lands, were necessary in the development and operation thereof under the terms of the leases and in order to comply with and perform those terms, were made "under proper supervision, in an economic and efficient manner, and the said improvements were all of the full value paid therefor to the lands covered by the aforesaid leases" of June 5 and December 11, 1922, that the expenditures were properly accounted for and vouchered, and the work actually cost the amounts allowed by the District Court, are all facts admitted by plaintiff (*R. v. III*, 1199-1201) and found by the District Court (*ib.* 1428). That the Secretary of the Navy had ample legal authority under the Act of June 4, 1920, to lease lands in the naval reserves is too clear for argument and has never been disputed. That he made the leases of June 5 and December 11, 1922, is proved beyond doubt. In these circumstances we submit there is no principle of equitable jurisprudence justifying the right of the Government to the useful and necessary improvements on the leased land and denying the right of the defendant to obtain the equivalent thereof which it has already received (*R. v. III*, 1199-1200).

3. As to both the Petroleum Company and the Transport Company, every dollar was paid pursuant to the compulsory provisions of the contracts and leases.

4. In both cases an equity is raised by such payment which should be applied so as to require the plaintiff to maintain each defendant in the position occupied before the contracts and leases sought to be rescinded were made. This position has been reestablished by the receipt of oil, etc., by the Petroleum Company from the leased lands.

5. In neither instance is there physical or legal difficulty or new affirmative action involved.

6. To require the Petroleum Company to yield back the value of every barrel of oil extracted from these lands, under the leases, and to enrich the Government by turning over to it the valuable permanent improvements, necessary to the production of that oil and to the lands' continued operation, is not, we submit, justice nor equity, but the imposition of an excessively harsh penalty—a thing abhorred by equity.

Conclusion.

The entire record is before this Court on writ of certiorari for its examination:

“It is undoubted that by the operation of the writ of certiorari, * * * the entire record is before us with power to decide the case as it was presented to the Circuit Court of Appeals, by reason of the writ of error issued out of that Court. Certain is it also that the Judiciary Act of 1891 contemplates that, as a general rule, where under its provisions a case comes to this Court on certiorari, * * * it will be disposed of so that the mandate of this Court, to avoid circuitry, will go directly to the Circuit (District) Court.”

Lutcher & Moore Co. v. Knight, 217 U. S. 257, 267.

To the same effect are *Delk v. St. Louis & S. F. R. R. Co.*, 220 U. S., 580; *The Conquerer*, 166 U. S. 110.

We respectfully submit that the decrees of the Circuit Court of Appeals and of the District Court should

be reversed and the cause remanded to the latter Court with directions to dismiss the bill.

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